Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

JOHN DANIELS, et al.

v.

WAYNE BURSEY, et al.

IN RE: APPEAL OF JOHN KORESKO AND ROBERT SCHMIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a cause of action for breach of fiduciary duty under ERISA §§ 409 and 502 is a plan asset, such that named plaintiff in a putative class action becomes a fiduciary on behalf of absent participants and the plan, and breaches its fiduciary duty when the plaintiff abandons the class action for its individual financial advantage?

2. Whether, after the filing of a motion for class certification, a former participant in an ERISA plan or the attorney for a putative class of participants has standing to protest settlement by the class plaintiff, withdrawal of class action allegations, and refusal of the district court to permit substitution of a new class representative?

   a. Does the word "bound" as used in *Lujan* mean that a party is not injured unless it would be prevented from relitigating an issue?

   b. Has the member of a putative class who participates in a case, files objections to settlement and dismissal, and requests leave to substitute a class representative, constructively intervened so as to have standing to appeal?

   c. Because of the potential for unreviewable fiduciary misconduct, should a district court review settlement of claims in an uncertified class action brought under ERISA, despite the amendments to FRCP 23(e) which indicate a district court's review is discretionary?

PARTIES TO THE PROCEEDING

A. Petitioners

JOHN KORESKO, a Pennsylvania citizen, is an attorney and Certified Public Account and is licensed in both professions to practice in the Commonwealth of Pennsylvania. At all times relevant to this case Mr. Koresko was counsel of record to Sanchez and Daniels and its partners as well as the putative class, Plaintiffs below and Robert Schmier and Schmier Feurring Properties, Inc., objectors below.

ROBERT SCHMIER is an adult individual and resident of the state of Florida and is a Principle in the business known as Schmier Feurring Properties. Mr. Schmier was a participant in the STEP Plan. He participated in the case below as an objector.

SCHMIER FEURRING PROPERTIES is a corporation and has a place of business in the state of Florida. Schmier-Feurring Properties, Inc. is an employer participant in the STEP and participated in the case below as an objector

B. Respondents

SANCHEZ & DANIELS ("SD") is an Illinois general partnership involved in the practice of law with a place of business in Chicago, Illinois

JOHN DANIELS ("DANIELS") is a general partner of SD with a place of business in Chicago, Illinois. DANIELS is a participant of the SD STEP PLAN.

MANUEL SANCHEZ ("SANCHEZ") is a general partner of SD with a place of business in Chicago, Illinois. SANCHEZ is a participant of the SD STEP PLAN

TIMOTHY HOFFMAN ("HOFFMAN") is a general partner of SD with a place of business in Chicago, Illinois. HOFFMAN is a participant of the SD STEP PLAN.

DIANE HUNTLEY ("HUNTLEY") is an employee of SD with a place of business in Chicago, Illinois. HUNTLEY is a participant of the SD STEP PLAN.

JOSEPH BONACCORSI ("BONACCORSI ") was a general partner of SD with a place of business in Chicago, Illinois. BONACCORSI is a participant of the SD STEP PLAN.

MARY OBRZUT ("OBRZUT") is an employee of SD with a place of business in Chicago, Illinois. OBRZUT is a participant of the SD STEP PLAN.

EDWARD ORDONEZ ("ORDONEZ") is an employee of SD with a place of business in Chicago, Illinois. ORDONEZ is a participant of the SD STEP PLAN.

All of the foregoing parties appeared as Plaintiffs in the case below. The following parties were all Defendants in the case below.

STEP PLAN SERVICES, INC. ("STEP SERVICES") is a Connecticut corporation. STEP SERVICES is an agent and/or affiliate of BENISTAR INSURANCE GROUP, INC. ("BENISTAR INSURANCE") a/k/a BENISTAR ("BENISTAR").

BENISTAR ADMININSTRATION SERVICES, INC. ("BENISTAR ADMIN"), is a Delaware Corporation. BENISTAR ADMIN is an agent and/or affiliate of BENISTAR and STEP SERVICES.

BENISTAR INSURANCE GROUP, INC. ("BENISTAR INSURANCE") a/k/a BENISTAR ("BENISTAR"), is a Delaware corporation.

BENISTAR 419 SERVICES is a Connecticut corporation.

BENISTAR 419 PLAN is an unincorporated entity .

BENISTAR TRUST Services is a Delaware corporation.

BENISTAR LTD is a Delaware corporation.

DANIEL CARPENTER ("CARPENTER") is a Connecticut citizen and a principal of the BENISTAR ENTITIES. CARPENTER directly or indirectly controls the BENISTAR ENTITIES and STEP SERVICES.

WAYNE BURSEY ("BURSEY") is a Connecticut citizen and a principal of BENISTAR and STEP SERVICES.

MELLON TRUST OF NEW YORK ("MELLON") is a corporation licensed to do business in the State of Illinois.

PRUDENTIAL INSURANCE COMPANY ("PRUDENTIAL") is an insurance company licensed to do business in the State of Illinois.

METLIFE, INC. ("METLIFE") is an insurance company licensed to do business in the State of Illinois.

NEW YORK LIFE INSURANCE COMPANY ("NEW YORK LIFE") is an insurance company licensed to do business in the State of Illinois.

ALLMERICA FINANCIAL BENEFIT INSURANCE COMPANY ("ALLMERICA")is an insurance company licensed to do business in the State of Illinois.

HARTFORD LIFE INSURANCE COMPANY ("HARTFORD") is an insurance company licensed to do business in the State of Illinois.

NATIONAL LIFE INSURANCE COMPANY ("NATIONAL LIFE") is an insurance company licensed to do business in the State of Illinois.

THOMAS MURPHY CLU & ASSOCIATES ("CLU") was at all relevant times an Illinois Insurance Agency licensed to do business in the State of Illinois.

THOMAS MURHY ("MURPHY") was at all relevant times, an agent of CLU and PRUDENTIAL)

UNITED STATES TRUST COMPANY ("US TRUST") is a corporation licensed to do business in the State of Illinois.

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OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois by the Honorable Matthew Kenelley relating to the questions involved herein are not reported and are included in the Appendix to this Petition. (App. B&O)

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 430 F3d 424 (7th Cir. 2005) and is included in the Appendix to this Petition. (App. O)

STATEMENT OF JURISDICTION

The Order denying reconsideration and hearing *en banc* was docketed in the United States Court of Appeals for the Seventh Circuit on January 17, 2006 and the amended Order was docketed on January 20, 2006. (App. A) These Orders were the final decision of the Court of Appeals. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S. C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America- Article III, Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all cases affecting Ambassadors, other public ministers and Consuls;--to all cases of admiralty and maritime Jurisdiction;--to controversies to which the

United States shall be a Party;--to controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

Employee Retirement Income Security Act of 1974, as amended ("ERISA") §409 [29 U.S.C. §1109]; Liability for breach of fiduciary duty –

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA §502(a) [29 U.S.C. § 1132(a)]; Civil enforcement -

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

to redress such violations or to enforce any provisions of this subchapter or the terms of the plan.

Federal Rules of Civil Procedure

Rule 23(e). Settlement, Voluntary Dismissal, or Compromise. (effective December 1, 2003)

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

Rule 23(e) (Prior to Amendment of 12/1/03)

Dismissal or Compromise: A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

STATEMENT OF THE CASE

A. Summary

This case arises from a suit filed as a class action in the United States District Court for the Northern District of Illinois. Petitioner Koresko was counsel to a putative class for which Sanchez and Daniels, its partners and certain employees were the representative plaintiffs (collectively "SD"). The claims are more fully discussed below.

Prior to disposition of a class certification motion, and just a few months before trial, SD sought to withdraw all class allegations and settle their individual claims in exchange for a substantial cash payment. (App. E) Petitioners Robert Schmier and Schmier-Fuerring Properties, Inc. ("Schmier"), members of the putative class, appeared through Koresko, filed objections to the settlement, and requested a stay in order to substitute a class representative. (App. C&D) The District Court denied any stay and deemed the other requests moot because it allowed SD to "withdraw" all class action allegations by way of amended complaint, and then dismissed the complaint. (App. O) Koresko and Schmier appealed to the United States Court of Appeals for the Seventh Circuit, but the Court held that Petitioners did not have standing to appeal.

B. History of the Case

In 1995, a partnership of lawyers from Chicago, Sanchez & Daniels ("SD"), adopted a purported welfare benefit plan

called the Severance Trust Executive Program ("STEP") to provide life insurance, disability and severance benefits to partners and certain employees of the firm. Promoters of STEP represented that STEP was a true welfare benefit plan described in Internal Revenue Code ("Code") §419A(f)(6), 26 USC §419A(f)(6), and not a plan of deferred compensation. (App. M) The promoters promised, *inter alia*, immediate tax deductions.

Several Respondents, known as "Administrative Defendants,"[1] administered STEP, created marketing materials and solicited insurance companies and salesmen. Another group of Respondents, referred to as the "Insurance Companies,"[2] promoted STEP, adapted or approved the STEP marketing materials, and permitted their agents to sell life insurance policies on the lives of STEP participants.

In addition to SD, 255 employers adopted STEP for the benefit of 857 participants. (App. L&M) SD as well as all employers and participants were damaged as the Plan assets were mismanaged while large commissions were paid to

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[1] The "Administrative defendants" are Wayne Bursey, Daniel Carpenter, STEP Plan Services, Inc., Benistar Insurance Group, Inc., Mellon Trust of New York, Teplitzky & Company, Benistar 419 Plan Services, Benistar Admin. Services, Inc., Benistar 419 Plan, Benistar Employer Trust Services Corp., and Benistar, Ltd.

[2] The "Insurance Company" defendants are National Life Insurance Co., Allmerica Financial Benefit Insurance Co., New York Life Insurance Co., Metropolitan Life Insurance Co., Hartford Insurance Co., and Prudential Insurance Co.

the salesman. Further, excessive fees were paid to the Administrative Defendants.

In 1995 the Internal Revenue Service ("IRS") gave notice of its intent to litigate the deductions claimed by plans like STEP. Notice 95-35, 1995-23 IRB 10. IRS audited several employers who contributed to STEP including Coastal Neurological Surgery Medical Group ("Coastal"). Coastal petitioned the United States Tax Court to contest disallowance of its STEP contributions. It is believed that STEP improperly used Plan assets to fund the Coastal challenge to the IRS. It was not a successful effort as Coastal stipulated that its contributions were to a plan of deferred compensation not a welfare plan.[3] This highly important information was never disclosed to SD or other contributing employers. (App. L&M)

When SD adopted the STEP Plan in 1995, U.S. Trust, a nationally known financial institution, was the trustee. In late 1996, U.S. Trust resigned as trustee. (App. M) This event under the Plan documents was to set in motion procedures for appointment of a new trustee or Plan termination. No one notified Plan Participants that a termination event occurred.

After the resignation of U.S. Trust, a series of events transpired that were orchestrated by Teplitsky. The objective was to prevent appropriate Plan termination and distribution of assets. Moreover, the Defendants below sought to use the

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[3] United States Tax Court Docket No. 6153-97.

Plan to generate fees and commissions for their own benefit and to the detriment of Plan Participants.

SD through Mr. Koresko made demand of STEP to transfer its plan assets without reduction to a non-STEP welfare plan. In response to a demand letter, STEP immediately sued SD and their counsel for commercial defamation[4]. That suit was dismissed, and SD commenced the class action.[5]

In 2002, John Daniels of SD filed this case on behalf of himself, SD and others similarly situated as a class action. Plaintiffs alleged that the Defendants, either directly or in concert with each other, violated fiduciary duties under ERISA and engaged in RICO violations.

In February 2004, SD hired attorney Clinton Krislov to assist Koresko with the class action. Krislov and Koresko prepared and filed Plaintiffs' motion for class certification in May 2004. (App. I) After the defendants rejected class-wide

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[4] It is apparently STEP's tactic to sue anyone who challenges the manner in which the STEP Plan was administered. Throughout this case SD and their lawyers have been subjected to multiple strike suits for commercial defamation. These suits were filed despite STEP's payment of a substantial settlement and documented IRS litigation as to the disallowance of 419A(f)(6) deductions.

[5] The action was originally filed in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 02-8213. With the consent of the parties and approval of the Court, the case was voluntarily dismissed. It was then filed in the Circuit Court of Cook County, Ill., and removed to the United States District Court for the Northern District of Illinois.

settlement demands proffered by Koresko in June 2004, Krislov and the parties pursued settlement without Koresko. Krislov then filed several requests to delay disposition of the class certification motion, while he engaged in negotiations for the benefit of SD. (App. C&D)

On June 14, 2004, the District Court denied the first Motion for Injunctive Relief filed by Koresko for Plaintiffs. That motion sought appointment of a receiver over STEP trust assets and records. The Court denied the Motion, as there was not sufficient evidence to link STEP to its former and now criminally indicted chairman, Daniel Carpenter. (App. N) Upon the discovery of additional evidence, a Second Motion for Injunction and Appointment of a Receiver was filed in August 2004. (App. F). This Motion was never reached given the now challenged settlement.

At the same time the Second Motion for Injunction and Appointment of a Receiver was pending, Koresko filed a Motion to Withdraw as Counsel for SD. (App. H). Because Defendant SSI filed suit against Koresko and the Plaintiffs in the Eastern District of Pennsylvania, Koresko believed that a conflict of interest had developed. Koresko's representation of the putative class was not in question.

Krislov and SD negotiated a settlement for themselves. In exchange for payment of a substantial sum to SD, the Defendants agreed to dismiss SD from the Philadelphia strike suit previously noted [while leaving Koresko as a Defendant there]. SD agreed to *withdraw* [not dismiss] *the class allegations* by amendment of the Complaint. (App. E) Petitioner Koresko entered his appearance on behalf of the putative

class members Robert Schmier and Schmier & Fuerring Properties, Inc. as Objectors, and filed extensive objections to the proposed settlement and amendment of the Complaint. Most importantly, Koresko sought stay of the dismissal in order to substitute Schmier or any appropriate party as the class representative. (App. C&D) The District Court deemed the Motions as moot and the Seventh Circuit Court of Appeals opined there was no standing to appeal.

REASONS FOR GRANTING THE WRIT

This case involves four questions of first impression. First, this Court should declare that a cause of action under ERISA for breach of fiduciary duty is property. When a named plaintiff for a putative class of plan participants exercises control over that intangible asset, he should be deemed a fiduciary with respect to the interests of the plan and other participants, consistent with *Varity Corp. v Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). This Court should also declare that ERISA grants former participants standing to appeal, even if the participants do not formally intervene in a putative class action involving rights under Petitioners' ERISA plan. The next issue involves the natural extension of this Court's holding in *Devlin v. Scardelletti,* 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). As the *Devlin* majority noted, "[a]lthough this Court has never addressed the issue, non-named parties in privity with a named party are often allowed by other courts to appeal from the order that affects them." *Devlin,* at 536 U.S. 10, 122 S.Ct. 2010. Petitioners suffered both redressable injury and were in privity with Plaintiffs and Defendants. Standing should have been recognized. Finally, the Court should clarify the scope of

amended Rule 23(e), Fed.Rul.Civ.Pro. In a class action under ERISA, Rule 23(e) should not be literally applied to excuse the district court from reviewing a settlement involving plan fiduciaries. All of these issues have tremendous significance outside the dispute between the parties and resolution of any one of them in favor of Petitioners mandates reversal.

I. THE CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY WAS A PLAN ASSET, AND SD VIOLATED ERISA BY DESTROYING IT FOR THEIR SOLE FINANCIAL ADVANTAGE. PERMITTING ABANDONMENT OF THE CLASS CLAIMS UNDERMINES THE OPERATION OF ERISA §§ 409 AND 502

The courts below overlooked a clearly illegal aspect of the settlement, which triggered Petitioners' opposition. To permit settlement to stand under these circumstances undermines the operation of ERISA §409.

ERISA was enacted in order to protect employee pension and welfare benefit plans. [See H.R. Rep. No. 533, 93d Cong., 2nd Sess. 1, reprinted in 1974 U.S.C.C.A.N. 4639, 4639]. One of the ways ERISA accomplishes this goal is "by setting forth certain general fiduciary duties applicable to the management of [such] plans." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). In relevant part, ERISA provides that "a person is a fiduciary with respect to a plan to the extent" that he or she "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the administration" of the plan. 29 U.S.C. § 1002(21).

The term "fiduciary" is liberally construed in keeping with the remedial purpose of ERISA. *American Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U.S.*, 841 F.2d 658, 662 (5th Cir. 1988).

The fiduciary duties at issue in this case are the duty of loyalty and the duty to avoid self-dealing. Under ERISA, the duty of loyalty is expressed as follows:

(1)[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries . . . . 29 U.S.C. § 1104(a)(1)(A)(i).

The prohibition against self-dealing provides that "[a] fiduciary with respect to a plan shall not . . . deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1). The "duty of loyalty" requires fiduciaries to act with "complete and undivided loyalty to the beneficiaries of the trust" and with an "eye single to the interests of the participants and beneficiaries." *See, e.g., Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984), *cert. denied sub nom., Engle v. Estate of Johnson*, 479 U.S. 1078 (1989); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2nd Cir.), *cert. denied*, 459 U.S. 1069 (1982). ERISA's "duty of care" requires each fiduciary to act with the "care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters" would employ. 29 U.S.C. § 1104(a)(1)(B). These

duties originate in the common law of trusts, to which Congress specifically looked when legislating ERISA's fiduciary duties. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc.*, 472 U.S. 559, 570 (1985), citing S. Rep. No. 93-127, p. 29 (1973), 1974 U.S.C.C.A.N. (88 Stat. 832) 4639, 4865 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); H.R. Rep., No. 93-533, p. 11 (1973), 1974 U.S.C.C.A.N. (88 Stat. 832) 4649 (identical language).

ERISA provides, in pertinent part, that a person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i) and (iii).

Plaintiffs below sued for relief under ERISA §§409 and 502(a), 29 U.S.C. §§ 1109 & 1132(a), to obtain appropriate equitable relief for breach of fiduciary duty. The claims for breach of fiduciary duty under ERISA § 409 were not personal to SD, but rather contemplated plan-wide relief. *See Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). It is hornbook law that a claim or cause of action is property.

When SD took control of plan-wide remedies under ERISA Sec. 409 and 502(a) for such a long period of time in the context of this putative class action, they exercised control over a plan-wide asset. *See Realty Holding Co. v.*

Donaldson, 268 U.S. 398, 401 (1925) (a trust beneficiary's rights are an interest in property, "more than a bare right and much more than a chose in action"). SD therefore became ERISA fiduciaries when they exercised dominion and control over an asset belonging to each plan and participant in the putative class. *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065 (1996). The mere fact that SD did not intend to be a fiduciary is irrelevant, as activities define fiduciary status under ERISA. *Id.* That control of the class claim, and the subsequent harm to its realization by the settlement, is within the scope of ERISA protection. *Varity*, 116 S.Ct. at 1077 (" [ERISA] § 409 reflects special congressional concern about plan asset management"); see also, *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466 (7th Cir. 1997), citing *Chronister Oil Co. v. Unocal*, 34 F.3d 462, 465 (7th Cir. 1994) (recognizing liability for lost opportunity costs). That asset (the claim and the remedy) cannot be utilized and realized for the benefit of the fiduciary alone, especially when other beneficiaries may be unable to assert the claims preserved by SD for itself.

The Department of Labor ("DOL") agrees with Petitioners' argument. In Prohibited Transaction Exemption ("PTE") 2003-39, 68 Fed. Reg. pp 75632-640 (Dec. 31, 2003), DOL issued guidance regarding the settlement of lawsuits arising under ERISA. The DOL views a potential claim or "chose in action" as a type of property and that a plan's release of its claim against such party in interest may constitute a prohibited sale or exchange with the plan, as well as a prohibited transfer or use of plan assets for the benefit of a party in interest. *Id.* *See*, Notice of Proposed Prohibited Transaction

Exemption, 68 Fed. Reg. 6953 (Feb. 11, 2003); DOL Opinion Letter 95-26A (which provides some guidance regarding how this type of prohibited transaction can occur). *See also*, PTE 1999-31.

The instant case is not simply a benefits dispute, the resolution of which lies outside the scope of a prohibited transaction. *Lockheed Corp. v. Spink*, 517 U.S. 882, 892-93 (1996). Plaintiffs sought restitution for Defendants' failure to transfer or distribute plan assets as well as Defendants' unauthorized taking of plan assets. According to DOL, not only is settlement of lawsuits a fiduciary activity, it is a prohibited transaction (self-dealing) under ERISA §406 when plan-wide claims against the settling fiduciaries are involved. Under ERISA § 406(b) [29 U.S.C. § 1106(b)], fiduciaries are prohibited from: (1) dealing with plan assets to benefit themselves; (2) representing parties with interests adverse to the plan or its participants or beneficiaries in transactions concerning the plan; or (3) receiving any form of consideration from any party dealing with the plan in a transaction involving its assets. It is a per se violation of 29 U.S.C. § 1106(b) for a fiduciary to engage in any of these transactions regardless of whether bad faith or the reasonableness of the transaction has been demonstrated. *Leigh v. Engle*, 727 F.2d 113, 123-4 (7th Cir.1984); *see also Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) (concluding that § 1106(b) creates a per se ERISA violation and that the exemptions contained in 29 U.S.C. § 1108(b) do not apply to § 1106(b)).

At a minimum, DOL requires involvement of a third party to review the settlement terms. PTE 2003-39. However:

"The exemption also provides that the settlement must not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. The intent of this condition is not to deny direct benefits to other parties to a transaction but, rather, to exclude transactions that are part of a broader overall agreement, arrangement or understanding designed to benefit parties in interest."

Id. at 75638. In addition:

"The fiduciary that authorizes the settlement must have no relationship to, or interest in, any of the other parties involved in the litigation, other than the plan, that might affect its best judgment as a fiduciary."

Id. at 75638. These conditions cannot apply here. The entire purpose of the settlement agreement below was to benefit STEP Services, Inc., the Benistar entities, Carpenter, and other parties in interest who faced RICO and other liability for abstraction of plan assets. Third party review did not occur here, for even the District Court disclaimed any obligation of review. Furthermore, there was no acknowledgement that the settlement agreement was executed by a fiduciary acting on behalf of the plan. *Id.*, at 75633. Since the litigation had not been certified as a class action by a court, "an attorney or attorneys retained to advise the plan on the claim, and having no relationship to any of the parties, other than the plan," must determine "that there is a genuine controversy involving the plan." Thus, in the future, not only must there be a genuine controversy, but the plan must engage an attorney to determine that there is a genuine controversy, and that attorney must be unrelated to any of the non-plan parties

to the dispute. That did not occur here, and there was no payment to the plan. *Id.* at 75639.[6]

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[6] Some additional comments about the exemption:

(1) The DOL has eliminated the requirement that the independent fiduciary "negotiate" the settlement because it realizes that in class action settlements, the "plan fiduciary's role in negotiating the terms of the settlement may be limited." However, the DOL warns that "even where negotiation does not take place between the plan and the defendant, a fiduciary will be compelled, consistent with ERISA's fiduciary responsibility provisions, to make a decision regarding the settlement on behalf of the plan, even if that decision is merely to accept or reject a proposed settlement negotiated by other class members."

(2) Regarding class action lawsuits, the DOL had much to say in the exemption. A Plan fiduciary, faced with a non-opt out class action settlement, "must take such actions as are appropriate under the particular circumstances" and "object to its terms" where necessary on behalf of plan participants. "If the fiduciary takes no action, and the case is settled for far less than the full value of the plan's losses, the burden will be on the fiduciary to justify its inaction."

(3) The original proposed exemption only allowed the receipt of cash in exchange for a release. The final exemption permits "assets other than cash" where necessary to rescind a transaction that is the subject of the litigation, or where such assets are qualifying employer securities for which there is a generally recognized market and value.

The interpretation advanced by Petitioners is a natural and necessary outgrowth of the intersection of ERISA with Rule 23. Parties will be less likely to induce or cooperate with inappropriate actions, like those committed below, because schemes by non-fiduciaries to persuade named plaintiffs to violate fiduciary duty will have their own serious consequences. *See Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) (non-fiduciaries liable).

Congress intended that ERISA to protect all plan assets and participants subject to its remedial scheme. An enhanced duty of loyalty under ERISA should attach to class representatives and others who use the class action device exclusive of any jurisprudence under Rule 23,

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(4) The final exemption provides that the settlement must be reasonable in light of the plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.

(5) Finally, the DOL addresses the fact that it is not uncommon for the same transactions to give rise to both ERISA and securities fraud claims and that participants and/or fiduciaries have been able to modify the terms of a release to permit the plan to receive a share of the securities fraud settlement without releasing its ERISA claims against the parties in interest. The DOL notes "that plan fiduciaries should consider whether additional relief may be available for the ERISA claims before agreeing to a broad release."

Fed.Rul.Civ.Pro. It is indeed a cruel paradox, seemingly embraced by the courts below, that parties in charge of an ERISA case could be deemed fiduciaries for purposes of Rule 23, so as to minimize chicanery and sell-out in the class action process, but not fiduciaries for purposes of ERISA §§ 409 and 502.

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*,75 F.3d 1191, 1197 (7th Cir. 1996). However, "public interests may potentially conflict with the desire of the parties to settle their dispute." *Id.*, at 1197 (citations omitted). **In addition, the Court "cannot approve a class action settlement 'which either initiates or authorizes the continuation of clearly illegal conduct.'"** *Id.* (citations omitted) (emphasis added). *See also Kelly v. Kosuga*, 358 U.S. 516, 520, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 261-67, 29 S.Ct. 280, 53 L.Ed. 486 (1909)(a court cannot lend its approval to any contract or agreement that violates the law).

The amendment to the complaint and associated settlement violated ERISA. Review by this Court is required to ensure the integrity of ERISA and reverse an error of law.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT OBJECTORS JOHN KORESKO, ROBERT SCHMIER AND SCHMIER FEURRING PROPERTIES, INC. DID NOT HAVE STANDING

A. Petitioners Had Standing Under ERISA.

The Circuit Court appeared to ignore its own precedent that an ERISA plan beneficiary or participant has standing to sue under ERISA, 29 U.S.C. §1102. *Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786 (7th Cir. 1996). In *Panaras,* the court held that standing extended to former participants and employees if they had a colorable claim to a payment from a severance plan. *Id.*, at 791, citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117-18 (1989). Just as SD and Schmier alleged in the present case, *Panaras* argued that he [was] entitled to relief, "because the severance plan was modified without properly notifying him of the change...." *Id.* It follows logically that if former participants or beneficiaries have standing sue under ERISA, they should also have standing to appeal.

B. The Court of Appeals Incorrectly Assumed That Putative Class Members Who Complain About A "Sell-Out" or "Pick-off" Cannot Appeal Unless The District Court Grants Their Motion to Intervene.

Devlin v. Scardelletti, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), holds that *non-intervening* objectors may appeal from settlement decisions involving a certified class.

Relying on *Devlin*, the Court of Appeals held that Petitioners were not among persons with capacity to appeal, since there was no certified class and "they were not bound" by the contested settlement. Even though the Court of Appeals chose to phrase the relevant issue in this case as "capacity to appeal," the issue of standing is the threshold question in every federal case. *Warth v. Seldin,* 422 U.S. 490, 498(1975).

Devlin was never intended by the Supreme Court to imprison "non-party standing" within the realm of only the certified class. This Court's holding in *United States Parole Commission v. Geraghty,* 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) lays bare the error of the strict reading of *Devlin* given by the Court of Appeals:

> "Although one might argue that . . . the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation, e. *g., Gerstein v. Pugh,* 420 U.S. 103, 110, n. 11, 95 S.Ct. 854, 861, n.11, 43 L.Ed.2d 54 (1975). The "capable of repetition, yet evading review" doctrine to be sure, was developed outside the class-action context. See *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 514-515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where

> the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake."

Id., at 100 S.Ct. 1209-10. The Court of Appeals failed to consider whether the wrongs alleged by Petitioners fell within the category of "capable of repetition, yet evading review."

The Court of Appeals relied on the interpretation of *Devlin* set forth in *Korsczak v Sedeman*, 427 F.3d 419 (7th Cir. 2005) for its holding that the failure to intervene deprived Petitioners of standing. Petitioners respectfully submit that either the interpretation or the holding of *Korsczak* must be inaccurate. The *Korsczak* court observed that *to intervene* in a suit is to become a party to it, and a party has a right to appeal from a judgment that inflicts a sufficiently tangible injury on him. *Id.* at 419. *Devlin* holds, however, that the term "party" is irrelevant to analyzing standing. *Korszak* at 422. Even if an intervenor is called a "party," he cannot force litigation to judgment or take an appeal unless he has the kind of interest that confers standing. *Id.* at 420. A "nonparty," [i.e., one who is not an original litigant, not joined, or not permitted intervention] has the ability to litigate and appeal if he has a "tangible interest." *Korsczak* at 420. Accordingly, if the Court of Appeals were true to *Devlin* and *Korsczak,* it should have eschewed the concept of intervention as the *sine qua non* of standing.

The court below should have instead looked for the "tangible interest" for standing in terms of "the irreducible con

stitutional minimum." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State,* 454 U.S. 464, 472 (1982) (citations omitted) The interest can be established if the person seeking to invoke a court's authority can "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Id.* In other words, the Court of Appeals should have simply looked for three elements: (1) injury, (2) causation, and (3) redressibility. *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002); citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Even the mere likelihood of an indirect injury suffices to confer standing upon a plaintiff. *Clinton v. City of New York*, 524 U.S. 417 (1998). One cannot evaluate "capacity to appeal" without reference to the *Lujan* factors. The Circuit Court did not apply *Lujan* at all and ignored the satisfaction by Petitioners of each *Lujan* element.

The injuries below shone so bright as to have been apparently blinding. First, substantial evidence showed that STEP should have terminated long ago; and thus the actions of the Defendants, vis-à-vis Schmier, SD and the other members of the putative class, were not legal from 1996 to 2002. Hornbook trust law states that since SD produced evidence in its First Motion for Preliminary Injunction that the Defendants were not legitimately in control of STEP or plan assets, the burden of proof shifted to the Defendants to prove the rightfulness of their status and legality of their dealings with Plan assets. *See Chao v. Graf*, 2002 WL 1611122 (D.Nev. 2002)(receiver granted in case of fraudulent multiple em-

ployer trust). In other words, the District Judge incorrectly disposed of the request for injunctive relief because neither SD nor Schmier had *any* burden of proof regarding irreparable harm. (App. F & L). Because the Defendants never satisfied their burden of proof, injury to trust beneficiaries and participants had to be presumed by law. If the District Court had not erred in allocating the burden of why assets and authority should be removed from illegitimate fiduciaries, Defendants would never have been in the position to settle anything. SD never withdrew or disclaimed the Motion, which brought these matters to light. The two courts below erred in the application of hornbook trust law. This error negatively impacted Schmier and others, and it was redressable by the Court of Appeals.

C. Petitioners Had Standing Because Of Participation In The Case Constituting Constructive Intervention, Or Because A Motion To Substitute A Class Representative Is Equivalent To A Formal Motion To Intervene.

Schmier and other putative class members suffered damages apparently incapable of review, because the Seventh Circuit ruled that no one has standing to question breach of fiduciary duty in a pre-certification setting unless they formally intervene. The court completely ignored the doctrine of *constructive intervention*.[7] In the present case, Petitioners

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[7] See: 28 USCA sec. 1367; *United Mine Workers v Gibb*, 383 US 715, 86 S.Ct. 1130 (1966)—The Federal Rules are to be given the broadest scope and joinder of parties, claims and remedies is

participated in this case as objectors. They filed motions and briefs. The District Court recognized that there was a colorable argument for their participation. In fact, the record reflects that Petitioners actually had to move to compel discovery of the contested settlement agreement, even though Petitioner Koresko had not been permitted to withdraw as counsel for plaintiffs! The Defendants and Plaintiffs both treated Petitioners as adverse parties.

Most notably, Petitioners filed a motion for stay so that a successor class representative could be substituted for Daniels and SD. (App. C). In other words, Petitioners asked that the case not be dismissed immediately so that a new plaintiff could come into the case. There is no substantive difference between that motion and a motion to intervene. Both seek the same result – a new party. If the motion for stay to enable substitution of plaintiff was in substance a motion to intervene, Petitioners had a right to appeal. *Devlin, supra*; see also *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)(would be class representative had standing to appeal).

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strongly encouraged. Inclusion of all state and/or federal claims by the exercise of the Court's jurisdiction is the general rule rather than the exception. *Colorado River Conservation District v United States*, 424 U.S. 800, 817 (1976); Where there is an interest relating to the subject matter of the action, impairment of a party to protect the interest; inadequate representation by parties to the suit and a timely request, intervention is proper. *United States v Oregon*, 913 F2d 576 (9th Cir. 1990)

D. Petitioners Were In Privity With Defendants and Plaintiffs, Triggering Petitioners' Standing To Appeal

The *Devlin* majority recognized that certain "nonparties" would have standing to appeal:

> ...in particular, those in privity with the named party...True enough. It is not at all clear, however, that such parties may not themselves appeal. Although this Court has never addressed the issue, nonnamed parties in privity with a named party are often allowed by other courts to appeal from the order that affects them. 5 Am.Jur.2d, Appellate Review § 265 (1995).

Devlin, at 536 U.S. 10, 122 S.Ct. 2010. That issue is now ripe for review because the Circuit Court never considered whether Petitioners had privity with the Plaintiffs or Defendants.

There were at least three elements of privity involved in this case. First, SD had been attorneys in the case representing all plaintiffs. (App. C & D). Second, Schmier was a beneficiary of the STEP plan. He was in legal privity with the various defendants who were fiduciaries, controlled his plan assets or benefits, and provided the life insurance contracts he signed under the plan. (App. C) Schmier was also in privity with SD and other defendants by virtue of the structure of STEP. Designed as a multiple-employer plan,

STEP purported to hold all assets in an "unweighted and undivided common fund." (App. C & M) This meant that Schmier had an undivided interest in all funds payable from STEP to SD, or any settlement funds paid by other Defendants which could have been illegally taken from the trust, as alleged in the complaint.

E. For Purposes of Standing, *Devlin* Contemplates That a Person Injured By A Court's Action Is "Bound" by a Judgment.

Neither the Seventh Circuit below nor the *Devlin* court explained specifically what it means to be "bound." Without sufficient analysis, the Seventh Circuit said that Petitioners in the present case are not bound, so they have no injury of which to complain. This disposition of the problem ignores both *Lujan and Devlin*. Regardless of whether a litigant is "bound" in the sense of *res judicata* or collateral estoppel, he can still be injured. *Lujan* inquires whether a litigant has suffered an economic or noneconomic injury as a result of the district court's ruling that can be ameliorated by the appellate court. *Lujan* does not rest on whether anyone is "bound" in a procedural sense. The *Lujan* factors are fact specific, regardless of the procedural posture of a case, with consideration of the practical effects of a court's action upon litigants.

It is not enough for the Court of Appeals to say that Schmier could have filed its own lawsuit once SD agreed to dismiss the instant case. *Lujan* also speaks of noneconomic injury. The Courts below did not consider the expense of repeating litigation that had already consumed two years of the Court's resources, the impact of Defendants' strike suit

strategy on the ability of Schmier to find counsel willing to again incur this abusive litigation, the repugnance of the law to fiduciaries serving under false pretenses (regardless of whether any economic injury occurred), and the general opportunity costs to STEP participants and beneficiaries of justice delayed.

F. Because of the potential for unreviewable fiduciary misconduct, a district court should review settlement of claims in an uncertified class action brought under ERISA, despite the amendments to FRCP 23(e) that indicate a district court's review is discretionary.

Seventh Circuit case law states repeatedly that a district judge and counsel for the putative class (like Krislov in this case) owe fiduciary duties to unrepresented persons. *See Reynolds v. Beneficial Nat. Bank,* 288 F.3d 277, 279-80 (7th Cir. 2002) ("The district judge in the settlement phase of a class action suit is a fiduciary of the class, subject therefore to the high duty of care that the law requires of fiduciaries"); *Culver v. City of Milwaukee,* 277 F.3d 908, 913-15 (7th Cir. 2002) (class representative, lawyer for putative class, and district judge are all fiduciaries). A fiduciary relation assumes that there is a duty of loyalty to someone else – in this case, members of the putative class who otherwise have no voice. Yet, when the District Judge, Defendants, Plaintiffs and Krislov hid behind their interpretation of amended Rule 23(e), they seemingly forgot how fiduciaries are supposed to act.

Thus, a paradox accompanies amended Rule 23(e). Prior to the amendment, the law was clear. Even if the parties did not seek it, the district court had a duty to review under Rule 23(e) anytime a class action allegation was made. *Reynolds, supra; Culver, supra; Bieneman v. City of Chicago,* 838 F.2d 962, 963-964 (7th Cir.1988). Otherwise, the plaintiff could withdraw as representative unilaterally, *Bieneman, supra.*, just as SD did. Although a district court is no longer *required* to evaluate the fairness of a settlement of an uncertified, putative class action under Rule 23(e), the courts below imply that substantive jurisprudence regarding fiduciary duties in class action cases has been modified – lessening duties of the district judge and counsel. Nothing in the reports accompanying adoption of the Rule indicates any intention by this Court to supplant substantive precedent.

If Rule 23(e) is a substantive change to the law, it should not have been applied in this case at all. The version of a federal procedural rule in effect at the beginning of a lawsuit continues to be the law of the case. *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund,* 25 F.3d 509 (7th Cir. 1994)(court applied version of Rule 11 existing at beginning of litigation). No doubt, the changed Rule had a profound substantive impact on the case. It cannot, therefore, be applied retroactively unless the legislature made clear its intention that it shall apply. *Landgraf v. USI Film Products,* 511 U.S. 244, 270, 114 S.Ct. 1483, 1499, 128 L. Ed. 2d 229, 255 (1994). Neither Congress nor the Supreme Court expressed any intent to apply Rule 23(e) retroactively.

In the present case, there is injury, causation and redressability, which the Court of Appeals simply overlooked. This case should be reviewed by the Supreme Court because of misinterpretations of *Lujan* and *Devlin* apparently occurring in the Circuit Courts of Appeal. Before the Plaintiffs' class action bar spins Rule 23(e) out of control to the detriment of countless invisible faces, this Court should make clear that fiduciary duties which existed in prior law were not impacted by the amendment to Rule 23(e) and that somebody has standing to question compliance with those duties. Perhaps the simplest way to resolve the paradoxical impact of Rule 23(e) on fiduciary duties is to clarify that this Rule cannot be literally applied in a class action involving ERISA.

CONCLUSION

For all of the foregoing reasons, Petitioners John J. Koresko, Robert Schmier and Schmier and Feurring Properties respectfully request that this Honorable Court grant certiorari and all appropriate relief consistent with the issuance of the Writ.

Respectfully submitted,

John J. Koresko, V
Attorney For Petitioners

Supreme Court, U.S.
FILED

05 1329 APR 14 2006

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN DANIELS, et al.

v.

WAYNE BURSEY, et al.

IN RE: APPEAL OF JOHN KORESKO AND ROBERT SCHMIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

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APPENDIX

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APPENDIX A – PETITION FOR REHEARING EN BANC, DATED JANUARY 17, 2006

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 17, 2006

Before
Hon. Joel M. Flaum, *Chief Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 04-4316

John Daniels, Manuel Sanchez, Timothy Hoffman, et al.,
Plaintiff-Appellees,

v.

Wayne Bursey, Mellon Trust of New York, Prudential Insurance Company of America, et al.
Defendants-Appellees.

Appeal of:
John J. Koresko, V.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 03 C 1550

Matthew F. Kennelly, *Judge.*

ORDER

On consideration of the petition for rehearing en banc filed by appellant, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX B – MEMORANDUM OPINION, FILED NOVEMBER 29, 2005

In
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 04-4316

JOHN DANIELS, MANUEL SANCHEZ,
TIMOTHY HOFFMAN, ET AL
Plaintiffs-Appellees,

v.

WAYNE BURSEY, MELLON TRUST OF
NEW YORK, PRUDENTIAL INSURANCE COMPANY
OF AMERICA, ET AL.
Defendants-Appellees.

APPEAL OF:
John J. Koresko, V.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 C 1550 – Matthew F. Kennelly, *Judge*.

Argued September 28, 2005 – Decided November 29, 2005

Before FLAUM, *Chief Judge*, and MANION and EVANS, *Circuit Judges*.

MANION, *Circuit Judge:* Sanchez & Daniels, a Chicago law firm, along with several of its partners and employees filed a putative class action suit against administrators and insurers of a benefit fund, alleging that defendants fraudulently marketed and administered the fund. Before a class was certified, the parties agreed to a settlement. John J. Koresko, an attorney for Plaintiffs, filed an appeal on his own behalf and on behalf of putative class members, objecting to the settlement and challenging certain rulings by the district court. Because we concluded that Koresko and the putative class members are not parties to this litigation, thus lacking the capacity to appeal, we dismiss the appeal.

I.

Sanchez & Daniels enrolled in a "severance trust executive program" ("STEP") in 1995 to provide benefits for its employees. In the complaint, Sanchez & Daniels named more than twenty defendants that were involved in marketing, administering, or insuring the STEP plan. Various defendants allegedly promoted the STEP plan as a tax deductible program, which would provide participants with death, disability, and severance benefits, while keeping the funds safe from creditors. These attributes were designed to attract and benefit high income owner-employees.

In 1997, the Internal Revenue Service audited another STEP plan participant, Costal Neurological Surgery Medical Group, that had taken deductions for its contributions to the plan. The audit resulted in proceedings before the United States Tax Court. On February 6, 2001, contrary to the marketing plan, the Tax Court accepted a stipulation by Costal

admitting that the plan was not tax deductible and disallowing approximately 75 percent of the deductions.

After the Tax Court's ruling, on March 28, 2001, Sanchez & Daniels attempted to withdraw from the plan. Responding to concerns from a number of plan participants, including Sanchez & Daniels, the STEP plan administrator wrote to all the employers who were participating in 2002. The letter described the only two options for withdrawal from the plan: participants could terminate affiliation with the plan by forfeiting twenty percent of the plan assets, or participants could forfeit ten percent of the plan assets if they transferred the assets into a particular new plan that provided only death benefits. Sanchez & Daniels rejected both options. Instead, the firm's plan assets be transferred to a new, independent plan.

Litigation soon commenced, culminating in proceedings in the Northern District of Illinois.[1] In this case, Sanchez & Daniels alleged that defendants, through the financial struc-

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[1] Before this case was filed, the plan administrators sued Sanchez & Daniels and Koresko, as an individual, in the District of Connecticut, claiming that the firm had forfeited its plan assets and that Koresko had defamed the plan. Sanchez & Daniels, individually and on behalf of similarly situated participants, filed complaints against plan administrators and plan insurers in Pennsylvania state court, which was removed to the Eastern District of Pennsylvania before being voluntarily dismissed so the parties could proceed in Chicago. This case was then filed in Circuit Court of Cook County, and then removed to the Northern District of Illinois.

turing, marketing, and administration of the STEP plan, violated the Employee Retirement Income Security Act, the Racketeer Influenced and Corrupt Organizations Act, as well as various state statutes and common law.

Koresko filed a motion for leave to appear *pro hac vice* in the Northern District of Illinois on behalf of plaintiffs, which the plan administrative defendants opposed. Defendants claimed that because Koresko served as the Chief Executive Officer of Penn-Mont Benefit Services, Incorporated, he was a competitor of the plans. As a competitor, defendants argued, Koresko should not be given access to record through the litigation that Koresko could use to his advantage in the marketplace. The district court permitted Koresko's appearance, although the court noted that Koresko's "status as a competitor" may warrant limiting his access to discovery materials. Along with Koresko, plaintiffs were also represented by other counsel.

As the case developed, plaintiffs and defendants began to discuss settlement with the assistance of a magistrate judge. While settlement negotiations were proceeding, Koresko filed a motion to withdraw, claiming a conflict of interest with plaintiffs. Plaintiffs opposed his withdrawal. Because of his pending motion to withdraw, Koresko chose not to participate in the settlement discussions and endeavored unsuccessfully to delay the negotiations until after the resolution of his motion.

On September 8, 2004, the named plaintiffs and defendants reached a settlement. As part of the settlement, plain-

tiffs moved to amend their complaint to eliminate all class claims. Koresko, apparently representing the uncertified class members and his own interests, objected to the withdrawal of the class claims and to the settlement. He also moved for a preliminary injunction, appointment of a receiver, and expedited discovery, and filed an appearance on behalf of putative class members, Robert Schmier and Schmier and Feurring Properties, Incorporated (collectively "Schmier"). Plaintiffs disavowed Koresko's motions. After a hearing, the district court permitted the amendment to eliminate the class claims and denied as moot the motion for class certification. Since the settlement did not encompass any class claim, the district court determined that court approval of the settlement was not necessary. The district court therefore granted the motions by both parties to voluntarily dismiss their claims and entered judgment on October 26, 2004. Koresko filed this appeal on his own behalf and on behalf of the putative class, including Schmier.

II.

As a threshold issue, we must determine whether Koresko and the putative class have the capacity to bring this appeal. Although the parties have framed this issue as one of standing, the preliminary question is whether appellants Koresko and Schmier are parties to the litigation. *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002) ("What is at issue, instead [of standing], is whether petitioner should be considered of 'party' for the purposes of appealing the approval of the settlement."); *see also Korczak v. Sedeman*, 427 F.3d 419, 422

(7th Cir. 2005); *Churchill Vill. v. Gen. Elec.*, 361 F.3d 566, 572 (9th Cir. 2004) ("the issue is not precisely one of stan ing. . .Instead, the inquiry is best characterized as concerning the definition of a 'party' for purposes of appeal." (citing *Devlin*, 536 U.S. at 7)). A party has the capacity to bring an appeal, but a nonparty does not. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) ("[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.") (citation omitted); Fed.R.App.P.3(c) ("The notice of appeal must [ ] specify the party or parties taking the appeal . . ."). Neither Koresko nor Schmier was named as a party in the litigation, nor did either move to intervene before the district court. Furthermore, the district court never certified a class, so they are not members of a certified class. Thus, at least in the traditional sense, appellants are not parties.

Nonetheless, in limited circumstance Koresko and Schmier may be treated as "parties," and therefore have the capacity to appeal, even if they are not formally recognized as such. *Devlin*, 536 U.S. at 7 (noting that the Supreme Court has "never . . . restricted the right to appeal to *named* parties to the litigation" (emphasis added)). The Supreme Court instructed that "[w]hat is most important" to determining whether individuals are "parties" to an action is "the sense of being bound by the settlement." *Id.* at 10.

Because the class was not certified, Koresko and Schmier have not capacity to appeal just because they are members of a putative class. They may, however, still have the capacity to appeal if the settlement agreement binds them. To determine that possibility, we consider the settlement agreement.

which has been filed under seal. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak,* 313 F.3d 70, 81-81 (2d Cir.2002) ("To determine who may appeal, courts must ascertain whether putative appellants are 'bound by the order from which they were seeking to appeal.'" (citing *Devlin,* 536 U.S. at 8)). Without disturbing the confidentiality of the settlement, we note the following. The settlement agreement is between only the named plaintiffs and defendants. No class claims are resolved by the settlement. While the language suggests that the parties considered and anticipated actions that Koresko might take, Koresko is not bound by the agreement. Addressing contingencies is distinct from binding a third party. Koresko remains free to file a class action or his own claim. In fact, Koresko is currently litigating a fee dispute in a separate action that is pending before the district court. *See Sanchez & Daniels v. Koresko,* No. 04-5183 (N.D. Ill. Filed Aug. 5, 2004).

Because no settlement agreement binds Koresko or the putative class, Koresko and Schmie[illegible]e not in the same circumstances as the unnamed certified class member who was permitted to appeal in *Devlin.* Since a class was never certified, appellants were not members of a class, and therefore could not be bound. *See AAL High Yield Bond Fund v. Deloitte & Touche, LLP,* 361 F.3d 1305, 1310 (11th Cir. 2004) ("Persons who are not class members are not bound at all.") Even the dissent in *Devlin* noted that, "[n]ot even petitioner, however, is willing to advance the novel and surely erroneous argument that a non-named class member is a party to the class-action litigation *before the class is certi*

fied."Id. at 16 n.1 (Scalia, J. dissenting). Thus, *Devlin* does not extend to the appellants in this case.

Koresko attempts to create a theory under ERISA by inviting this court to determine that any attorney for a putative class has a fiduciary duty that elevates his status to that of a party. Koresko cites to *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002), for the proposition that a class action lawyer is the "real plaintiff in interest." In *Culver*, however, this statement was made in the context of illustrating "the danger that the lawyer will sell out the class in exchange for the defendant's tacit agreement not to challenge the lawyer's fee request." *Culver*, 277 F.3d at 910 (citations omitted). The *Culver*, case does not hold that a class action attorney is a party; rather, *Culver* suggests the precarious nature of such a proposition and notes that "the courts and Congress have balked" at considering a class lawyer as "the true plaintiff." *Id.* at 913. Accordingly, we decline to equate an attorney's role as a fiduciary of a class to that of a party.

III.

Since Koresko and Schmier are not bound by the settlement agreement, they do not qualify as parties to the litigation. Accordingly, appellants lack the capacity to appeal, and we therefore DISMISS the appeal.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, *et al.*,	: No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al*,	: Room 2106
Defendants.	:

TO: All Counsel of Record
(See attached Service list)

PLEASE TAKE NOTICE that on October 26, 2004 at 9:30 AM. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Matthew F. Kennelly, Presiding Judge, or any Judge sitting in his stead, in Courtroom 2106 or other courtroom assigned, in the United States District Court Northern District of Illinois Eastern Division, 219 S. Dearborn Street, Chicago, Illinois and shall then and there present **Objector Robert Schmier and Schmier and Feurring Properties, Inc. and John J. Koresko's Motion For Stay of Proceedings Pending Substitution of Class Plaintiff and Objection to Motion For Voluntary Dismissal** Also to be presented are **Motion of John Koresko to Require Notice of Settlement To Putative Class** and **.Motion to Permit Disclosure of Settlement Terms for the Purpose of Appeal.**

Respectfully submitted,

October 21, 2004

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, *et al.*,	; Case No. 03-CV-1550
Plaintiffs,	;
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al*,	: Room 2106
Defendants.	:

Motion For Stay of Proceedings Pending Substitution of Class Plaintiff and Objection to Motion For Voluntary Dismissal

John J. Koresko, V, Esquire moves on behalf of certain plaintiffs of whom Robert Schmier and Schmier and Feurring Properties, are part and respectfully requests that proceedings in the above action be stayed to permit substitution of a class plaintiff and further asserts objection to the Motion of Plaintiffs Sanchez and Daniel's Motion For Voluntary Dismissal. In support thereof, all prior memoranda of law as well as the attached memorandum are incorporated herein

Respectfully submitted,

_____

John J. Koresko, V, Esq.
Koresko & Associates, P.C.
200 West 4th Street

Bridgeport, PA 19405
(610) 992-2200

October 21, 2004

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, *et al.*,	: Case No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.*	; Room 2106
Defendants.	:

Motion To Require Notice of Settlement

Certain Plaintiffs and John Koresko, V, Esq. hereby request that this Court require Notice to be given to putative class members of any settlement in the above captioned matter.

Respectfully submitted,

_____

John J. Koresko, V., Esq.
Koresko & Associates, P.C.
200 West 4th Street
Bridgeport, PA 19405
(610) 992-2209

October 21, 2004

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, *et al.*,	: Case No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.*	: Room 2106
Defendants.	:

Motion To Permit Disclosure of Settlement Terms on Appeal

John J. Koresko, V, Esquire moves to require disclosure of the terms of settlement in the appeal of the above captioned matter to the United States Court of Appeals. In support thereof, all prior memoranda of law as well as the attached memorandum are incorporated herein.

Respectfully submitted,

_____

John J. Koresko, V, Esq.
Koresko & Associates, P.C.
200 West 4th Street
Bridgeport, PA 19405

October 21, 2004

APPENDIX C-OBJECTION TO MOTION TO AMEND AND MOTION TO STAY TO PERMIT SUBSTITUTION OF A CLASS REPRESENTATIVE, DATED OCTOBER 21, 2004

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, *et al.*,	: Case No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al*,	: Room 2106
Defendants.	:

MEMORANDUM OF ROBERT SCHMIER AND CERTAIN PLAINTIFFS AND JOHN J. KORESKO, V, ESQUIRE IN OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT, REMOVAL OF CLASS ACTION ALLEGATIONS AND ALTERNATIVELY IN SUPPORT OF MOTION FOR NOTICE TO MEMBERS OF THE PUTATIVE CLASS AND FOR STAY OF PROCEEDINGS TO ALLOW TIME TO SUBSTITUTE SUCCESSOR CLASS REPRESENTATIVE

OCTOBER 21 ,2004

KORESKO & ASSOCIATES, P.C.
BY: JOHN J. KORESKO, V, ESQ.
200 West 4th Street
Bridgeport, P A 19405
Tel: 610-992-2200
Fax: 610-992-1091

I. INTRODUCTION

Members of the putative class, including Robert Schmier and Schmier & Feurring Properties ("collectively, "Schmier"), by and through Attorney John Koresko ("Koresko"), object and move this Honorable Court not to dismiss the Complaint at this time.

II. STATEMENT OF INTEREST

Schmier is a member of the putative class described in the Second Amended Complaint and has standing to object. This court's order of October 21, 2004, granting the motion to amend. the SAC and the declared intention to dismiss this case impairs the obligations of the named plaintiffs (the "SD plaintiffs" or "SD") under their fee arrangements with Koresko Schmier and others are third party beneficiaries of those arrangements. Koresko is a fiduciary of the putative class members by operation of law.

III. LEGAL ARGUMENT

The Memorandum of Certain Plaintiffs and John J. Koresko, V, Esquire In Support of Motion To Reject Magistrate's Recommendation of Settlement, Objection To Proposed Settlement, And Objection To Motion To Amend Second Amended Complaint To Remove Class Action Allegations previously filed in this case is incorporated by reference and joined by Schmier.

As previously argued to this Court, "[a]lthough the mootness of a named plaintiffs claim does not automatically disqualify him from serving as class representative,

since it does not make the suit moot (the unnamed class member claims are not moot), it makes him presumptively inadequate, in our view, *unless the defendant is executing a strategy of buying off class representatives successively in an effort to derail the suit." Culver v. City of Milwaukee,* 277 F.3d 908, 912 (7th Cir. 2002) (citation omitted) (italics added). Rule 23 amendments did not affect this judicial exception. See also, *United States Parole Commission v. Geraghty,* 445 U.S. 388, 404, 100 S. Ct. 1202, 63 L.Ed.2d 479 (1980); *Kifer v. Ellsworth,* 346 F.3d 1155, 1156 (7th Cir. 2003), citing *Sosna v. Iowa,* 419 U.S. 393, 399-403, 95 S.Ct. 553,42 L.Ed.2d 532 (1975); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 755-56 and n. 8, 96 S.Ct. 1251,47 L.Ed.2d 444 (1976); *Primax Recoveries, Inc. v. Sevilla)* 324 F.3d544, 546-47 (7th Cir.2003); *Martens v. Thomann)* 273 F.3d 159,173 n. 10 (2d Cir.2001). Because the claims of other putative class are not moot, the proper procedure is to treat a motion for class certification as retroactive to the beginning of the case so as not to harm the putative class. *Id.*

Additionally, prior to dismissing this case, the court should at least allow a period of time for substitution of a class representative. Otherwise, the dismissal of the case will effectively prevent intervention. That will ead to the restarting of the statute of limitations, relitigation of the case, and other possible issues detrimental to the putative class. *Culver* at 914. There is no asserted emergency by SD plaintiffs that requires an immediate dismissal without giving some protection to the putative, class members. Distribution of any money is likely to be deferred, anyway, pending further actions in this case.

The Seventh Circuit clearly favors giving other class members a meaningful opportunity to intervene prior to entering a dismissal of a case started as a class action. As noted by Judge Posner in *Cohen v. Bank United*, 85 F.3d. 1347 (7th Cir. 1995):

> A decision that the claim of the named plaintiffs lacks merit ordinarily, though not invariably, disqualifies the named plaintiffs as proper class representatives. The effect is to moot the question whether to certify the suit as a class action unless the lawyers for the class manage to find another representative. *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir. *1994); Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 626 (7th Cir.1986).

In the present case, there has been no determination on the merits negative to the class claims. Moreover, this court has noted a probable success at trial in its Opinion denying Plaintiff's first motion for receivership. It would be grossly unfair and not protective of the rights of other members of the putative class to permit a dismissal without first giving counsel a reasonable time (no less than 90 days) to substitute another class plaintiff. The unfairness is compounded by the possibility that statutes of limitations against certain Defendants may run during that time. The "case" must be kept alive to prevent prejudice, especially when the Court is aware that defendants have raised the statute of limitations as a bar. Amendments to Rule 23 did not eliminate the jurisprudence that confirms the Court's role as a fiduciary to absent class members

Finally, this Court must be sensitive to a realistic impact of withdrawal of class claims. If there are no class claims, there is no class action vehicle into which a putative class member can intervene. Surely, such an anomaly is not consistent with Seventh Circuit precedent. Rule 15 provides that any amendment be in the interests of justice. Rule 41 incorporates a similar standard when class claims are involved. Justice can be served only if this court treats the putative class members fairly and consistent with the Court's role as "guardian" and "fiduciary." As the Seventh Circuit advised in *Culver*, notice is not an option when the due process rights of putative class members are at risk. "The judge's duty is to order notice unless the risk of prejudice to absent class members is nil and to review for adequacy the form of notice proposed by class counsel in response to the order." *Culver*, at 915.

IV. CONCLUSION

For the reasons previously stated, this Honorable Court should

1. Deny the Motion to Dismiss this action;

2. Order Notice of any settlement or dismissal to all members of the putative classes in form acceptable to the Court;

3. Stay all proceedings for 90 days to permit substitution of a replacement class representative.

Respectfully submitted,

John J. Koresko, V, Esquire
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, *et al.*,	: Case No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.*	: Room 2106
Defendants.	:

To: All counsel of Record
(See attached service list)

PLEASE TAKE NOTICE that on October 21, 2004 at 9:30 A.M. or as soon thereafter as counsel may be heard, I shall appeal before the Honorable Matthew F. Kennelly, Presiding Judge, or any Judge sitting in his stead, in Courtroom 2106 or other courtroom assigned, in the United States District Court Northern District of Illinois, Eastern Division, 219 S. Dearborn Street, Chicago, Illinois and shall then and there present **Certain Plaintiff's and John J. Koresko's Motion to Reject The Magistrate Judge's Settlement Recommendation and Objection to Proposed Settlement and Objection to Motion to Amend the Second Amended Complaint to Remove Class Allegations.**

October 11, 2004

Respectfully submitted,

John J. Koresko, V, Esq.
Koresko & Associates, PC
200 West 4th Street
Bridgeport, PA 19405
(610) 992-2200

APPENDIX D – MOTION TO REJECT SETTLEMENT, DATED OCTOBER 11, 2004

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, *et al.*,	: Case No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.*	: Room 2106
Defendants.	:

Motion of Certain Plaintiffs and John J. Koresko, V, Esquire to Reject Magistrate Judge's Settlement Recommendation and Objection to Proposed Settlement and Opposition To Motion To Amend Second Amended Complaint to Remove Class Allegations

John J. Koresko, V, Esquire on behalf of certain plaintiffs requests that this Court reject the recommendation of the Magistrate Judge to settle the above captioned matter. Objection is made on behalf of certain plaintiffs to the proposed settlement. Certain Plaintiffs are opposed to any amendment to the Second Amended Complaint to remove class allegations. In support of this motion and objections, attached hereto and incorporated herein is Plaintiffs' Memorandum of Law.

October 11, 2004

Respectfully submitted,

John J. Koresko, V, Esq.
Koresko & Associates, PC
200 West 4th Street
Bridgeport, PA 19405
(610) 992-2200

APPENDIX E – MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT TO WITHDRAW THEIR CLASS ALLEGATIONS, DATED OCTOBER 1, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, *et al.*,	)Case No. 03-CV-1550
Plaintiffs,	)
v.	)Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.*	)
Defendants.	)

. MOTION FOR LEAVE TO AMEND PLAINTIFFS' SECOND AMENDED COMPLAINT TO WITHDRAW THEIR CLASS ALLEGATIONS

Plaintiffs hereby respectfully request leave of this Court to amend and file their Third Amended Complaint to withdraw their class allegations, a copy of which is attached hereto as Exhibit A. In support thereof, plaintiffs state as follows:.

1. On November 07, 2003, Plaintiffs filed their Second Amended Complaint, asserting various causes of actions

against multiple Defendants, and seeking class certification on behalf of all individuals similarly situated.

2. Specifically, Plaintiffs alleged the following:

   a. Under Count 1, Plaintiffs alleged that the STEP program constituted" the illegal sale of Insurance and that the Defendants' participation constituted actionable violations of the insurance laws of all fifty states;

   b. Count II alleged that the Administrative Defendants and the Insurance Companies actions violated ERISA and violated their common law fiduciary duties to the Plaintiffs;

   c. Count III alleged that Mellon Trust of New York and Teplitzky & Co. breached their common law duty of care owed to the Plaintiffs;

   d. Count IV alleged that Murphy and the Insurance companies violated a duty of care, good faith and fair dealing owed to the Plaintiffs;

   e. Count V alleged violation of the Illinois Consumer Fraud and Deceptive Practices Act by Murphy, Prudential and the remaining Insurance Companies.

   f. Count VI alleged that Defendants violated the Racketeer Influenced and Corrupt Organizations Act, specifically that the STEP Plan was an enterprise;

g. Count VII alleged that Defendants violated the Racketeer Influenced and Corrupt Organizations Act, specifically that the Defendants constitute an association-in-fact enterprise.

h. Count VIII alleged that Defendants violated the Racketeer Influenced and Corrupt Organizations Act, specifically that the Defendants engaged in a conspiracy to violate RICO.

3. On March 24, 2004 the Court granted Defendants motion to dismiss in part, and denied it in part. After briefing on Plaintiffs Motion to Amend or Alter pursuant to Rule 59(e), on April 14, 2004, Judge Kennelly issued an Amended Memorandum Opinion and Order, with the following rulings:

a. The Court dismissed Count I in its entirety.

b. The Court denied the motion to dismiss Count II as to all Defendants.

c. The Court denied the motion to dismiss Count III.

d. The Court dismissed Count IV in its entirety.

e. The Court denied the motion to dismiss Count V.

f. The Court dismissed the Insurance Defendants, U.S. Trust and Mellon Trust from Count VI, but denied the motion as to the remaining Defendants.

g. The Court dismissed Count VII in its entirety.

h. The Court dismissed the Insurance Companies from Count VIII, but denied the motion as to the remaining Defendants.

4. Following that ruling, at the suggestion and direction of Judge Kennelly, this matter was referred to Magistrate Judge Schenkier for settlement mediation.

5. Per Magistrate Judge Schenkier's order of April 20, 2004, the parties began settlement discussion. Over the next month, the Parties met in person and by telephone, and, at Judge Schenkiers' direction submitted settlement positions~ by which Magistrate Schenkier inferred that the parties were not in the position to continue settlement discussions, and terminated the referral, returning the case to Judge Kennelly.

6. Throughout this entire process, Plaintiffs had deliberated on the merits of their individual case, as well as the eventual possibility of certifying a class of similarly situated persons. For a number of reasons, we concluded that there was substantial risk that the Court 'would find that all potential class members (252 of 253) might be regarded as having resolved their claims, leaving only Sanchez & Daniels with claims (thus, a "class" of only one employer member and fewer than five employees), and that there was substantial risk on the merits of their individual claims. See *Affidavit of Clinton A. Krislov* (Attached hereto as Exhibit B).

7. Confronting the real possibility that a class could not be certified, and that potential concerns existed even with

Plaintiffs" individual claims, measured with the costs of pursuing such claims, Plaintiffs believed it was in their best interest to reach an amicable settlement with all parties that resolved all claims between themselves and the Defendants.

8. Thus, we felt that it was important to cover the potential downside of the case. So we began searching for ways to obtain settlement" With some of the non-Benistar, non-privity insurance companies, we began meeting with them in groups, excluding Prudential and Benistar.

9. On June 20, 2004, counsel for Plaintiffs requested that Judge Kennelly again refer the parties to. Magistrate Judge Schenkier to conduct mediated settlement conferences, with the goal of obtaining partial settlements, while continuing to pursue claims against Prudential and Benistar.

10. On July 15, 2004, Magistrate Judge Schenkier ordered the parties to exchange settlement demands on July 21, 2004.

11. . Thereafter, on July 23, 2004, all parties participated in an all-day mediated session conducted by Magistrate Judge Schenkier. At the end of the day, Magistrate Judge Schenkier issued his settlement recommendation, and, per his July 26, 2004 order, gave the parties until the close of business on July 30, 2004 to either accept or reject his recommendation.

12. The Magistrate's recommendation was not successful. A follow-up status conference call was held on August 18, 2004, wherein an additional settlement conference was

scheduled for September 01, 2004, per Magistrate Judge Schenkier's minute order of August 18, 2004.

13. On September 01, 2004, the parties met for a number of hours, and eventually reached a tentative agreement as to the terms of the settlement, subject to actual commitment by certain parties. At the suggestion of Magistrate Judge Schenkier, the reply to class certification was continued pending the tentative settlement agreement, arid was entered by Judge Kennelly on September 08, 2004.

14. Throughout this process, and in light of the progress made in reaching a settlement, the parties agreed to enter and continue all matters before Judge Kennelly.

15 On September 08, 1004, the parties had their final settlement conference, wherein a settlement was reached. Finally, after 7 p.m., documented in a Memorandum of Understanding, signed by counsel for all parties, read into the record, and witnessed and signed by Magistrate Judge Schenkier.

16. On September 09, 2004, Magistrate Judge Schenkier entered an order indicating, that the parties had reached an agreement to settle all individual claims.

17. Plaintiffs further took into consideration their duties to the class of persons they were moving to represent, and consciously avoided impairing class claims if any class representative might wish to step forward and pursue claims for the class.

18. Rule 23(e), as amended effective December 01, 2003, now contemplates court involvement only where a class has been certified, stating "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Fed. R. Civ. P. 23(e)(I)(A).

19. The advisory committee notes expressly clarify that the amendment deletes any court supervision or approval of individual non-class settlements:

> **Paragraph (1).** Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues or defenses.
>
> Rule 23(e)(I)(A) resolves the ambiguity" in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be-and at times was read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal or compromise.

20. Although there are certainly instances where such a resolution could raise fiduciary concerns, this is not one of them. The Plaintiffs thoughtfully considered their chance of success on both the class claims, as well as the merits of the litigation, and engaged in lengthy and contentious mediation under the supervision of the assigned mediator, Magistrate Judge Schenkier. Plaintiffs now believe it is in their best in

terest to withdraw the class claims and settle this matter on an individual basis without impairing, in any way, the claims for the class.

21. It the understanding of the Plaintiffs that their actions will in no way harm the class, as any member of the putative class can assert those claims brought by Sanchez & Daniels, and that any statute of limitations for those claims asserted have been tolled by the filing of this class action.

WHEREFORE, Plaintiffs respectfully request this Court grant the Plaintiffs leave to file a third amended complaint withdrawing their class allegations.

Dated: October 01, 2004

Respectfully submitted,

_____

Attorney for Plaintiffs

Clinton A. Krislov
Jason P. Stiehl
Krislov & Associates Ltd.
Civic Opera House
20 N. Wacker, Suite 1350
Chicago, Illinois 60606
(312) 606-0500
Attorneys for Plaintiff

APPENDIX F – SECOND MOTION FOR INJUNCTION AND APPOINTMENT OF A RECEIVER, DATED AUGUST 24, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, *et al.*,	: No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.*	: Room 2106
Defendants.	:

TO: All Counsel of Record
(See attached Service list)

AMENDED NOTICE

PLEASE TAKE NOTICE that on August 31, 2004, at 9:30 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Matthew F. Kemelly, Presiding Judge, or any judge sitting in his stead, in the Courtroom usually occupied by him in Room 2106, in the United States District Court, Northern District: Eastern Division, Chicago, Illinois, and shall then and there present **PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION AGAINST ADMINISTRATIVE DEFENDANTS AND NEW BENISTAR DEFENDANTS, APPOINTMENT OF A RECEIVER and EXPEDITED DISCOVERY REQUEST**, a copy of which is attached.

Firm: Koresko & Associates, P.C.
Address: 200 W. 4th Street
City, State: Bridgeport, P A 19405

Attorneys for: Plaintiff
Phone: 610 992 2200
Attorney No.: 42795

Dated: August 24, 2004

Respectfully submitted,

_____

John J. Koresko, V
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DMSION

JOHN DANIELS, *et al.*,	: No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al,*	: Room 2106
Defendants.	:

TO: All Counsel of Record
(See attached Service list)

PLEASE TAKE NOTICE that on September 31, 2004, at 9:30 a.m., or as soon thereafter as counsel maybe heard, I shall appear before the Honorable Matthew F. Kennelly, Presiding Judge, or any judge sitting in his stead, in the Courtroom usually occupied by him in Room 2106, in the United States District Court, Northern District, Eastern Division, Chicago, Illinois, and shall then and there present **PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION AGAINST ADMINISTRATIVE DEFENDANTS AND NEW BENISTAR DEFENDANTS, APPOINTMENT OF A RECEIVER and EXPEDITED DISCOVERY REQUEST**, a copy of which is attached.

Firm: Koresko & Associates, P.C.
Address: 200 W. 4th Street
City, State: Bridgeport, P A 19405

Attorneys for: Plaintiff
Phone: 610 992 2200
Attorney No.: 42795

Dated: August 24, 2004

Respectfully submitted,

_____

John J. Koresko, V
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, *et al.*,	: No. 03-CV-1550
Plaintiffs,	:
v.	: Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.*	: Room 2106
Defendants.	:

Case No. 03-CV-1550

PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION AGAINST ADMINISTRATIVE DEFENDANTS AND NEW BENISTARDEFENDANTS, APPOINTMENT OF A RECEIVER and EXPEDITED DISCOVERY REQUEST

As new facts indicating irreparable injury to Plaintiffs have come to light, Plaintiffs, on behalf of the themselves and all others similarly situated, hereby submit this second motion for preliminary injunction against Defendants Wayne Bursey, Daniel Carpenter, STEP Plan Services, Inc., Benistar Insurance Group, Inc., Mellon Trust of New York and Teplitzky & Co., P.C. (collectively "Administrative Defendants") and Defendants Benistar Ltd., Benistar Employer Services Trust Corp., Benistar 419 Plan, Benistar 419 Admin. Services, Inc. and Benistar 419 Plan Services, Inc. (collectively "New Benistar Defendants") From further operating as Trustee of the Severance Trust Executive Programs

("STEP plans") and an expedited discovery of who is funding Defendants legal fees and costs against investigative audits being performed by IRS and various state authorities. In support of this motion, Plaintiffs state as follows:

1. Plaintiffs herein incorporate the allegations in its previous motion for preliminary injunction and memorandum related thereto. (Exhibit "A").

2. In deciding the previous motion, this Court determined that Plaintiffs had failed to make a showing of irreparable injury. A true and correct copy of the Order of June 16, 2004, is attached hereto as Exhibit "B".

3. New IRS investigations of STEP and Benistar have resulted in the issuance of extensive discovery demands, summons and summons enforcement proceedings as are more fully set forth herein: **IRS' Response to Petition to Quash** (Exhibit "C"); **IRS' Memorandum in Opposition to Petition to Quash IRS Summons** (Exhibit "D"); and **Declaration of IRS Agent Dominick Serviado, Jr.** (Exhibit "E").

4. On information and belief, the cost of defending against IRS and ongoing state investigations, such as that by the Connecticut State Department of Insurance.

will be borne by the plans and plan participants.

5. The cost of these investigative audits are not proper administrative fees to be borne by the plans and plan participants.

6. The cost of these investigative audits are for the benefit of Defendants, and not for the exclusive benefit of plan participants

7. Plaintiffs have alleged and repeat herein that the assets of the Plan are in danger of dissipation or in the hands of bad actors.

8. On information and belief, Defendants and their alterego, Daniel Carpenter, are insolvent.

9. Plaintiffs ask that the Court reconsider its prior ruling and grant the preliminary injunction.

10. Plaintiffs ask that a receiver or replacement fiduciary be appointed over all STEP assets, and all assets and policies attributable to Benistar 419 Plan or which Benistar 419 Plan attributes to asset transfers from STEP be segregated and controlled by the receive or replacement fiduciary.

11. Plaintiffs ask that, at a minimum, this Court order preliminary relief with a receiver in order to find out whether plan assets are being used for the exclusive benefit of plan participants

12. Plaintiffs ask that this Court order expedited discovery of the source of payment for defending against said investigative audits

For the foregoing reasons, as well as those provided in the attached memorandum, Plaintiffs respectfully request this Court enter a preliminary injunction against the Administrative Defendants and the New Benistar Defendants to prevent further abuse and waste of the STEP plan assets, the appointment of a receiver or temporary fiduciary, and expedited discovery of the use of plan assets to fund Defendants' investigative audits.

Dated: August 24, 2004

Respectfully submitted,

_____

Attorney for Plaintiffs

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EXHIBITS TO MOTION

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENISTAR 419 PLAN,	)
Petitioners,	)
v.	)
UNITED STATES OF	) Civil No. 04-2494
AMERICA	)
Respondent.	)

RESPONSE TO PETITION TO QUASH
EXPEDITED HEARING REQUESTED

Respondent the United States of America, files the following response to the Petition to Quash Summons, filed by Petitioners. In addition, the Respondent requests an expedited hearing on the Petition. A brief in opposition to the Petition, accompanied by a declaration from an IRS revenue agent, is filed herewith.

RESPONSE TO PETITION TO QUASH SUMMONS

1. Admits that on May 17, 2004, Revenue Agent Dominick Servadio, Jr. issued *one* Internal Revenue Service summons to Wachovia Bank, successor to First Union National Bank Trustee ("Wachovia") at 401 Market St., 11th Floor, Legal Department, Philadelphia, Pennsylvania 19106, requiring the production of thirteen categories of documents

pursuant to an investigation under Internal Revenue Code (IRC (26 U.S.C.) §§ 6700 and 7408 of Benistar, Ltd. Admits that *notice* of this one summons was sent to five entities by certified mail on the same day. Denies that revenue agent Dominick Servidio, Jr. issued five summonses to Wachovia on May 17, 2004

2. Admits that exhibit A attached to the petition to quash contains a copy of the summons issued to Wachovia and copies of the envelopes sent via certified mail to the five entities noticed.

Jurisdiction and Venue

3. Admits the allegations set forth in ¶ 3.

4. Admits the allegations set forth in ¶ 4.

Basis for intervention and Petition to Quash

5. Admits the allegations set forth in ¶ 5.

Preliminary Statement

The preliminary statement (and much of the petition) contains primarily legal argument to which no response is required here (although the legal argument is refuted in the Government's accompanying brief in opposition to petition to quash). To the extent a response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations about Benistar, Ltd. and Respondent denies the remaining allegations set forth in the paragraph titled "Preliminary Statement. "

6. Admits that Petitioners have petitioned this Court to quash the summons issued to Wachovia. Denies that their objections have merit.

a. Admits that IRC § 7609(a) and (b) provide the identified party in an IRS summons with the right to receive notice of and the right to intervene in the enforcement of a summons directed to a third party recordkeeper under the terms and conditions set forth in the statute. Admits that the summons is not related to an ongoing "audit" of any of Petitioners' income-tax liabilities but denies that the summons is unrelated to determining Petitioners' liability, since the summons relates to an investigation of Petitioners' liability for penalties under IRC § 6700. Denies the remaining factual allegations set forth in ¶ 6.A.

b. Admits that the IRS summons issued to Wachovia was issued in the matter of an investigation under IRC §§ 6700 and 7408 of Benistar, Ltd., as "Benistar, Ltd." is defined in attachment 1 to the summons. Respondent is without knowledge or information sufficient to form a belief as to the truth of Petitioners' allegation that they received a legal opinion. Denies the remaining factual allegations set forth in ¶ 6.B.

c. Admits that the Internal Revenue Service has authority to issue summonses under 26 U.S.C.

§ 7602, which provides the terms and conditions for the summons issued. Admits that Internal Revenue Service information document requests ("IDRs") sent to Benistar 419 Plan Services" Inc. are attached to the Petition to Quash as exhibit C. Admits that Petitioners' responses are attached to the Petition to Quash as exhibit D. Denies the remaining factual allegations set forth in ¶ 6.C.

d. Admits that four factors must be met in order for an Internal Revenue Service summons to be enforceable. Denies the remaining factual allegations set forth in 16.D.

e. Denies that the summoned documents and records are irrelevant as alleged in ¶ 6.E.

f. Denies the allegations set forth in ¶ 6.F.

g. Denies the allegations set forth in ¶ 6.G.

Specific Objections

Objection to request (a): Denies the allegations set forth in the specific objection to request (a).

Objection to request (b): Denies the allegations set forth in the specific objection to request (b).

Objection to request (c): Denies the allegations set forth in the specific objection to request (c).

Objection to request (d): Demes the allegations set forth in the specific; objection to request (d).

Objection to request (e): Denies the allegations set forth in the specific objection to request (e).

Objection to request (f): Denies the allegations set forth in the "specific objection to request (f).

Objection to request (g): Denies the allegations set forth in the specific objection to request (g).

Objection to request (h): Denies the allegations set forth in the specific objection to request (h).

Objection to request (i): Denies the allegations set forth in the specific objection to request (i).

Objection to request (j): Denies the allegations set forth in the specific objection to request (j).

Objection to request (k): Denies the allegations set forth in the specific objection to request (k).

Objection to request (l): Denies the allegations set forth in the specific objection to request (l).

Objection to request (m): Denies the allegations set forth in the specific objection to request (m).

Additional Objections

1. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in additional objection ¶ 1.

2. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in additional objection ¶ 2.

WHEREFORE.: the Respondent United States of America prays that the Court,

(1) schedule a hearing on an expedited basis;

(2) deny the Petition to Quash Summons;

(3) award Respondent its costs incurred in defending this action; and

(4) grant such other relief as is just.

DATE: August 17, 2004.

Respectfully submitted,

PATRICK L MEEHAN
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s/Evan T. Davis
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made upon the following through the Court's Electronic Court Filing system, this 17th day of August, 2004.

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENISTAR 419 PLAN,	)
Petitioners,	)
v.	)
UNITED STATES OF	) Civil No. 04-2494
AMERICA	)
Respondent.	)

MEMORANDUM IN OPPOSITION TO PETITION TO QUASH IRS SUMMONS EXPEDITED HEARING REQUESTED

The Internal Revenue Service ("IRS") issued a third-party summons to Wachovia Bank; in furtherance of its investigation of Daniel E. Carpenter and his related BENISTAR companies ("Petitioners").[1] Petitioners filed this petition to quash the Wachovia summons and the United States opposes that petition.

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[1] A similar third-party summons, issued to JP Morgan Bank, is the subject of a petition to quash in the Southern District of New York, Case No. 1:04-cv-04308-MGC.

ISSUES PRESENTED

1. Pursuant to an investigation of Petitioners, the IRS issued a third-party summons to Wachovia Bank, which Petitioners seek to quash. Courts should reject a petition to quash an IRS administrative summons if (1) the summons was issued for a legitimate purpose, (2) the information sought may be relevant to that purpose, (3) the proper administrative steps were followed, and (4) the information is not already in the IRS's possession. The Declaration of IRS agent Dominick Servadio, Jr. makes that showing for the Wachovia summons. Should the Court deny Petitioners' petition to quash?

2. Petitioners particularly challenge whether the United States has shown (2) above - whether the summons seeks information that may be relevant. The IRS may use its summons power to obtain information that "'may shed light on" its lawful investigation. The IRS is examining whether Petitioners have sold an abusive tax scheme (the BENISTAR 419 plan) subject to penalty under 26 U.S.C. § 6700 and to injunction under § 7408. The IRS wants to identify and contact BENISTAR's customers (a/k/a the "plan participants" and "'covered employees") to evaluate BENISTAR's marketing efforts and, if necessary, to review the customers' tax-returns. May the IRS obtain information from Wachovia that may shed light on whether Petitioners' BENISTAR 419 plan is an abusive tax scheme, subject to penalty and injunction?

3. The IRS may summon information that seeks to identify persons who are not subjects of the summons-related in-

vestigation-without using an *ex parte* "John Doe" summons procedure - if there is a valid investigative purpose. The IRS has identified a valid investigative purpose for the Wachovia summons: to determine (by contacting and examining customers) whether the BENISTAR419 plan is an abusive tax scheme. Because there is a valid investigative purpose, *even if* the IRS also sought the information to audit BENISTAR 419 plan participants-making this a "dual purpose" summons-the John Doe procedures do not apply. Should the Court reject Petitioners' attempt to require John Doe procedures for this summons?

4. The IRS need not establish "probable cause" to issue a summons, which some courts have called "a license to fish." However, Petitioners claim that the IRS must demonstrate that they are promoting an abusive tax scheme *before* summoning information from Wachovia that is needed to investigate the scheme. Should the Court require the IRS to first demonstrate that Petitioners have promoted an abusive tax scheme before summoning information needed to determine whether Petitioners have promoted an abusive tax scheme?

5. A summons is not vague or overbroad if it fairly advises the summoned party what information is sought, so that the party can respond adequately to the summons. The summons here describes precisely what information is sought, and Wachovia has not objected to it. Is the summons so vague or overbroad as to be unenforceable?

FACT

A. Background on the Section 6700 Investigation.

IRS revenue agent Dominick Servadio is conducting an investigation of a possibly abusive tax scheme organized and marketed by Petitioners.[2] This type of investigation is commonly referred to as a Section 6700 investigation named after the Internal Revenue Code ("IRC" or "26 U.S.C.") section that imposes a penalty on promoters of abusive tax schemes. The investigation also may result in, if appropriate, a request to the Department of Justice to enjoin Petitioners, pursuant to IRC § 7408, from further promoting abusive tax schemes.

A Section 6700 investigation is primarily an information-gathering exercise. The IRS must secure information and documents from the promoter and other sources that demonstrate the operation and organizational structure of the tax scheme or plan and how and to whom it was marketed. In addition, the IRS also must secure information regarding participants in the plan in part to determine what the promoter told them and gave them. The IRS may then examine some or all of the participants' tax returns or otherwise review those returns to see how the scheme was implemented. This is necessary to: (1) verify whether participants used abusive

[2] All factual statements are taken from the Declaration of Dominick Servadio, filed herewith

tax schemes on their tax returns; (2) secure promotional material and testimony about the promoter's tax-related statements; and (3) determine or estimate tax loss caused by the promotion.

Petitioners' possibly abusive tax scheme here involves the marketing of two "welfare benefit plans" that purport to be tax-free under IRC § 419A(f)(6). They are the BENISTAR 419 Plan and Trust, and the STEP Plan and Trust (hereinafter "the BENISTAR plan" or "plans").

B. Welfare-benefit Plans Generally

Welfare-benefit plans are employer-funded plans to which an employer makes contributions to provide benefits to employees such as disability, medical, and life insurance, or supplemental unemployment and severance pay. IRC §§ 419 and 419A limit tax deductibility of welfare-benefit-plan contributions. These § 419-based limitations do *not* apply to a fund that is part of a 10-or-more-employer plan that also meets the § 419A(f)(6) exception. The BENISTAR 419 plan claims to meet § 419 tax-exempt requirements and therefore is attractive to small-to-medium-sized closely held companies seeking to avoid paying taxes on distributions to certain employees. Petitioners market the BENISTAR plan to potential customers (who are employers) with the promise that all contributions to the plans are fully deductible for federal-income tax: purposes.

Employers using legitimate welfare-benefit plans that qualify for the § 419A(f)(6) exception can deduct qualifying contributions to the plan in the year made. Further, there are no tax consequences to the covered employees (they do not

recognize the contributions as income) as long as they remain enrolled. To qualify for the § 419A(f)(6) 10-or~more-employer exception (and favorable tax treatment), three factors must be met; (1) the plan must involve the participation of ten or more employers; (2) no single employer can contribute more than 10 percent of the total contributions to the plan in any given year; and (3) the plan cannot be "experience rated." The BENISTAR plan appears to be :"experience rated" as explained below. If so, contributions are not tax deductible to the employer or the employee.

Tax deductions claimed by employers who have contributed to purported welfare-benefit plans that fail to meet the 419A(f)(6) exception are disallowed by the IRS. In addition, covered employees who benefit from disallowed contributions must claim on their tax returns dividend or compensation income equal to employer contributions made on behalf of the covered employees.

C. The BENISTAR 419 Plan Buys "Cash Value" Insurance for Covered Employees with Contributions from Employers.

Contributions from employers who are BENISTAR plan participants *(i.e.,* BENISTAR customers) are processed by the plan administrator, in this case BENISTAR Admin Services, Inc., which forwards contributions to the plan's trust. A trustee bank (Wachovia in this case) receives the contributions and then uses the funds to purchase life insurance policies that cover the life of certain key employees (hereinafter" covered employees"). They are typically" cash value" policies that have an investment or savings component such as variable life, universal life, or whole life. The BENISTAR plan trust nominally owns the life insurance policies, but the covered employees designate a beneficiary.

The BENISTAR 419 plans are set up to provide "death benefits" in the form of life insurance. However, in reality, a participant can terminate from the BENISTAR plan at any time and the insurance policies (plan assets), with their accumulated cash value, are distributed to the covered employees, less any applicable fees. The BENISTAR plan cash-value policies appear to be merely temporary repositories for dividends or compensation owed to covered employees, set up to eliminate or defer taxes on that income.

D. The BENISTAR 419 Plan Is Experience-rated and Therefore Not Tax-deductible.

Where welfare-benefit plans purchase insurance policies that have cash values or savings components, those purchases are *not* tax-deductible. Insurance policies with cash

values or savings components are "experience rated," and welfare-benefit-plan purchases of experience-rated policies are not tax-deductible. Instead, IRC § 419A(f)(6) states that the 10-or-more-employer exception (which makes certain welfare-benefit plan payments tax-deductible) does not apply to plans that purchase experience-rated policies. A plan that purchased life insurance could only meet the § 419A(f)(6) exception if *term* life (instead of *whole* life or a similar cash-value type) insurance was used exclusively ill these plans.

The § 419A(f)(6) rules are designed, in part, to prevent taxpayers (employers and employees) from using welfare-benefit plans to set up disguised deferred-compensation accounts that circumvent the IRC s deferred-compensation limits. As a result, § 419A(f)(6) effectively requires that welfare plans pool (or purchase insurance that pools) contributions and risk (as does any legitimate insurance market).

The BENISTAR 419 plan, by purchasing "cash value" whole life insurance for each covered employee, appears to be a savings or deferred-compensation account masquerading as a welfare-benefit plan. Based on the documents the IRS has obtained to date, it appears that Petitioners maintain records that reflect each participant's contributions to the fund, each covered employee's account value, and any changes in cash value. Thus, there is separate accounting, and no true pooling of assets in a fund, as any legitimate welfare-benefit plan would have. Consequently, it appears that the BENISTAR plan is experience rated. If so, participants' contributions are not tax deductible and covered employees must include any contribution made on their behalf as in

come on their personal income-tax returns (IRS Forms 1040).

In addition, the contributions made to the BENISTAR plan generally far exceed the actual cost of providing current-year term insurance coverage on the covered employees. Therefore, the contributions would no the considered ordinary and necessary business expenses under IRC Section 162, and for this reason as well are not tax-deductible to the employer/participant.

E. The BENISTAR 419 Plan Appears to Be a Listed Transaction.

The IRS maintains a list of "potentially abusive tax shelters" to alert the public about shelters that may be abusive. Further, § 6111 requires promoters to register tax shelters and § 6112 requires promoters to maintain and turn over to the IRS upon request a list of tax-shelter customers. "These provisions were enacted by Congress as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat 494 (1984), for the purpose of providing the IRS with means to better monitor tax shelters, and, consequently, to deter abusive tax shelters that can adversely impact public revenues."[3]

Notice 2000-15, issued in February, 2000, made IRC § 419A(f)(6) plans officially listed transactions and characterized them as potentially abusive tax shelters. Based on the information currently available, the BENISTAR plan appears

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[3] United States v. BDO Seidman, 337 F.3d 802, 809 (7th Cir. 2003) (internal citation omitted)

to be a § 419A(f)(6) plan subject to Notice 2000-15. Notice 2000-15 states:

> Transactions that are the same as or substantially similar to transactions described in the list below have been determined by the Internal Revenue Service to be tax avoidance transactions and are identified as "listed transactions" for purposes of §1.6011-4T(b)(2) of the Temporary Income Tax Regulations and §301.6111-2T(b)(2) of the Temporary Procedure and Administration Regulations. As a result, corporate taxpayers may need to disclose their participation in these listed transactions as prescribed in §1.6011-4T, and promoters (or other persons responsible for registering tax shelter transactions) may need to register such transactions under §301.6111-2T. In addition, promoters must maintain lists of investors with respect to these listed transactions pursuant to §301.6112-1T.

It appears that Petitioners should have registered the BENISTAR 419 plan and turned over a customer list, as the IRS requested in its IDRs. Petitioners refused to turn over their customer list upon request, as noted in the Servadio Declaration.

F. Petitioners Refused to Provide a List of BENIST AR 419 Plan Participants, so the IRS Summoned Wachovia to Obtain the List.

To date, Petitioners have provided the following information: (1) the basic plan and trust documents of the BENIST AR § 419A plans, (2) completed IRS Forms 5500 and 1041 for the trust; (3) financial statements; (4) legal opinions; (5) adoption agreements; (6) a fee structure; (7) an operational overview; and (8) marketing and promotional materials.

The key information that Petitioners have refused to provide is a list of current and past participants in the BENISTAR § 419A plans. Revenue agent Servadio sent an Information Document Request (IDR) #1 to Petitioners. One request within that IDR asked petitioners to "identify all persons who have participated in or who are currently participating in each plan. . ." In response, Petitioners stated: BENISTAR objects to this request as it seeks information that is protected by third parties' rights to privacy and seeks information that is protected by the work product, trade secret, or other applicable privilege, seeks confidential and/ or proprietary information and seeks information that is irrelevant and immaterial to this investigation and whether the BENISTAR 419 Plan is a plan as described under IRC Section 419A(f)(6)."

Based on this response, the IRS issued (after following appropriate procedures) a third-party summons to Wachovia Bank, which was a trustee bank for the BENISTAR 419A plan. The Wachovia third-party summons includes two attachments: Attachment 1 contains definitions for the summons and Attachment 2 contains a list of requested documents. The information requested in Attachment 2 is designed to identify the participants in Petitioners'

BENISTAR 419 plans. The information requested also is designed to elicit the amount and dates of contributions to the plan's trust accounts, and the trust's use of those contributions. None of this information is in the possession of the IRS because Petitioners have refused to provide it.

The documents and information that the IRS seeks from Wachovia Bank would shed light on the names and numbers of participants in the Petitioners' BENJSTAR 419 plans, the dates and amounts of contributions to the plans, how the contributions were invested. Further, the Wachovia information will also permit the IRS to look at customers' tax returns to: (1) verify whether participants and covered employees used abusive tax schemes on their tax returns; (2) secure promotional material and testimony about the promoter's tax-related statements; and (3) calculate or estimate tax loss caused by the promotion. This information is needed in a Section 6700 investigation to determine what Promoters (and their salespersons) said to participants, whether the statements are false or fraudulent, whether the promoters knew or had reason to know the statements were false or fraudulent, and whether to impose penalties on Promoters.

ARGUMENT

THE COURT SHOULD DENY THE PETITION TO QUASH

I.

THE RESPONDENT HAS PROVED A *PRIMA FACIE* CASE AGAINST QUASHING THE SUMMONS

A. Congress Has Given the IRS a Broad Duty and Broad Powers to Investigate.

The Secretary of the Treasury and the Commissioner of Internal Revenue are charged with administering and enforcing the Internal Revenue Code ("IRC"). Section7601 of the IRC (26 U.S.C.) describes the IRS's statutory duty and powers of investigation in very broad terms, providing:

> The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax. . . .

Congress has given an extraordinarily broad mandate to the IRS to enforce the internal revenue laws and related statutes, which direct (not just permit) the IRS to inquire as to an "persons who may be liable to pay any internal revenue tax.[4]

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[4] *See United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 308 (1978); *Donaldson v. United States*, 400 U.S. 517, 523 (1971)

The great breadth of §7601's mandate is facilitated by the substantial arsenal available to the IRS to ensure the enforcement of the internal revenue laws.

Indeed, in order to determine the correctness of any return or to determine the liability of any person for any internal revenue tax, the IRS may examine any books, papers, records, or other data *which may be relevant* or *material to such inquiry*, may issue summonses as to any person in order to obtain any books, papers, records, or other data *that may be relevant or material to the inquiry*, and may take such testimony, under oath, as may be relevant or material to the inquiry. [5]

The Supreme Court has observed that Congress intentionally gave the IRS broad authority when it enacted § 7602:

> In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design. *As* we noted in *United States v. Bisceglia*, 420 U.S. 141,146 (1975):
>
> "The purpose of[§ 7602] is not to accuse, but to inquire. Although such investigations unquestionably

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(imposing upon the Secretary the duty "to canvass and to inquire").

[5] 26 U.S.C. § 7602(a)(emphasis added)

> involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records."[6]

The Court also has observed that, "[T]he § 7602 summons is critical to the investigative and enforcement functions of the IRS. . . ."[7] There is, therefore,. no question that the IRS has the duty and the power to conduct this examination to determine whether the BENISTAR 419 plan is an abusive tax scheme, subject to penalty under § 6700 and to injunction under § 7408. A key part of that investigation involves finding Petitioners' customers, evaluating their tax returns, and discussing with them Petitioners' promotional statements and materials.

B. The United States Has Established a *Prima Facie* Case to Enforce the Summons and Therefore the Court Should Deny the Petition to Quash.

In order to stay compliance with an IRS summons on a third-party such as Wachovia, the subject of the investigation must promptly file a petition to quash and comply with all the service requirements of the statute.[8] The United States

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[6] *United States v. Arthur Young & Co.*,. 465 U.S. 805, 816 (1984); *accord, Hintze v. IRS*, 879 F.2d 121, 125 (4th Cir. 1989).

[7] *Arthur Young & Co.*, 465 U.S. at 814.

[8] 826 D.S.C.§§7609(b)(2)(A)-(B).

may then seek enforcement of the summons in the proceeding.[9] As discussed below, the attached declaration of revenue agent Dominick Servadio establishes a *prima facie* case to deny the petition to quash the IRS summons to Wachovia at issue here without the necessity of discovery or an evidentiary hearing.

Courts have denied petitions to quash and granted the United States' motions for summary enforcement of IRS summonses in all but the most exceptional circumstances.[10] The Supreme Court, in *United States v. Powell*, held that the United States demonstrates a *prima fade* case for enforcement by showing: (1) that the summons was issued for a proper purpose; (2) that the inform anon sought *may be* relevant to that purpose; (3) that the information sought is not already in the possession of the Internal Revenue Service; and (4) that the administrative steps required by the Code with respect to the issuance and service of a summons have been followed. [11] The United States generally establishes this showing by submitting a declaration from the agent who is

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[9] 26 U.S.C. §7609(b)(2)(A). Wachovia has agreed to comply fully with the summons upon disposition of this case, and therefore the Government does not presently seek to enforce the summons.

[10] *Hintze*, 879 F.2d at 126.

[11] *United States v. Powell*, 379 U.S. 48,57-58 (1964); *Hintze*, 879 F.2d at 126; *United States v. Ritchie*, 15 F.3d 592,599-600 (6th Cir.), *cert. denied*, 513 U.s. 868 (1994).

sued the summons, establishing the four elements described in *Powell*. [12] "Once a prima facie case has been established, the burden shifts to the taxpayer to prove that enforcement of the summonses would be an abuse of the court's process. *[United States v. Will]*. This burden is a heavy one.[13]

In two cases this Court" recently enforced IRS summonses against customers of a tax scheme called "Xelan," which is similar to Petitioners' plan. In *Cohen v. United States*,[14] as in the BENISTAR 419 plan, the Xelan tax plan involved a purported loophole created by IRC § 419A and large (purportedly tax-deductible) life-insurance payments from an employer that were also ostensibly tax-deferred to the employee. The Cohens' were Xelan customers undergoing an IRS income-tax audit. The IRS sought information regarding the identities of other Xelan customers to determine how the Xelan plan worked and thereby determine whether the Cohens' employers' payments to Xelan's § 419A plan could qualify as tax-deductible insurance payments. In *Cohen*, the summons was not, as here, part of a Section 6700 investigation, and therefore the identities of other tax-scheme customers was arguably *less* relevant than here. Even so, this Court determined that all four *Powell* factors were present, and that the petitioners' claims of irrelevance and failure to com

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[12] *United States v. Will*, 671 F.2d 963, 966 (6th Cir. 1982).

[13] *Kondik v. United States*, 81 F.3d 655, 656 (6th Cir.1996), *citing United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978).

[14] 306 F. Supp. 2d 495 (B.D. Pa. 2004).

ply with John Doe procedures were unavailing. This Court used the same analysis and reached the same result in *Xelan, Inc. v. United States*,[15] which, like *Cohen*, involved xelan's § 419A plan. In a case procedurally identical to the present one, *Liberty Financial Services v. United States*[16] the IRS served a third-party summons on a bank to determine whether Liberty Financial was liable for penalties under § 6700. Liberty Financial tried to quash the summons, arguing- as Petitioners do here- that the IRS failed to meet the four *Powell* requirements and that the third-party summons should be subject to the additional "John Doe" summons requirements. The district court and the Ninth Circuit rejected these "arguments and noted that the IRS need not comply with the John Doe requirements for a dual-purpose summons,[17] citing the seminal case *Tiffany Fine Arts, Inc. v. United States*.[18] We discuss *Tiffany Fine Arts* in more detail below, when we address Petitioners' affirmative arguments in favor of quashing the summons.

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[15] 2004 WL 1047721 (E.D. Pa. May 6, 2004).

[16] 778 F.2d 1390 (9th Gr. 1985). *See also United States v. Balanced Financial Management*, 769 F.2d 1440~ 1449 (10th Gr. 1985) (upholding enforcement of IRS summons in Section 6700 investigation and specifically rejecting the "John Doe" argument).

[17] *Id.* at 1393.

[18] 469 U.S. 310 (1985).

The Servadio Declaration establishes all four of the *Powell* requirements.

1. *The summons was issued for a legitimate purpose.*

The IRS is investigating whether the BENISTAR 419 plan is an abusive tax scheme. The summons directed at obtaining BENISTAR customer information was issued for a legitimate purpose as part of that investigation. The Third Circuit recently upheld the IRS's determination that a program broadly similar to the BENISTAR 419 plan was, in fact, an improper scheme for avoiding income taxes on the "premiums." In *Neonatology Assocs., P.A. v. Commissioner,* the court affirmed a Tax Court decision that upheld the IRS's determination that excess refundable "premiums" paid for such insurance were, in fact, a series of disguised dividends that were taxable to the doctors, and not deductible to their Subchapter C employers.[19] The Third Circuit implicitly determined that the plan in *Neonatology* was an abusive tax scheme and commented on the participants' unlikely claim that they believed the tax-scheme-promoter's pitch:

> We also add the following. When, as here, a taxpayer is presented with what would appear to be a fabulous opportunity to avoid tax obligations, he should recognize that he proceeds at his own peril. In this case, PES devised a program which it marketed as "creat[ing] a tax deduction for the contributions to the employee welfare benefit plan going in and a permanent tax deferral coming out." As

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[19] 299 F.3d 221 (3d Cir. 2002), *aff'g.* 115 T.C. 43(2000).

> highly educated professionals, the individual taxpayers should have recognized that it was not likely that by complex manipulation they could obtain large deductions for their corporations and tax free income for themselves.[20]

The IRS seeks the summoned information from Wachovia to determine, in part, the extent to which the BENISTAR 419 plan is similar to the program struck down in *Neonatology*. The IRS certainly is entitled to identify and contact BENISTAR plan participants to explore the similarities, and to inquire about their dealings with Petitioners in order to investigate whether the BENISTAR 419 plan is an abusive tax scheme.

Petitioners claim, on behalf of their customers and not themselves, that the summons amounts to harassment and therefore was not issued for a legitimate purpose. In support of this conclusion, Petitioners assert that Wachovia, a large bank, will hold BENISTAR's (and Wachovia's) customers responsible for the costs of responding to the summons (called "improper demands" in the Petition).[21] This, in turn, purportedly will sour Wachovia's relationship with its account-holders who also are BENISTAR's customers. This argument fails because: (1) IRC § 7610 provides for reimbursement of summons-related costs and (2) the Servadio Declaration demonstrates amply that the summons was is

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[20] 299 F.3d at 234.

[21] Petition at 6.

sued for a legitimate purpose and not to affect any Wachovia-customer relationship.

2. The summoned information might throw light upon the Section 6700 investigation.

To establish the second element Under *Powell*, the United States must show that the summoned information is potentially relevant to the inquiry, that is, whether it "might throw light upon" the subject of the IRS investigation.[22] Courts have held this is a "minimal" standard.[23] Here, the Servadio Declaration explains in great detail why the IRS seeks this information from Wachovia, and how it might throw light upon the Section 6700 investigation.

As noted above, BENISTAR's customers have claimed substantial tax benefits from their participation in the BENISTAR 419 plan. Of particular importance is whether this program is, in fact, a life-insurance program as Petitioners contend, or whether it is a scheme for improperly circumventing income taxes on wage and dividend income. An essential part of a Section 6700 investigation is to interview the scheme's customers and look at their tax returns. This process can yield invaluable information such as: the promoter's (BENISTAR's) oral and written statements to customers about the tax benefits of the scheme; apart from what is contained in standard promotional materials; the custom

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[22] *United States v. Rockwell Int'l*, 897 F.2d 1255,1263 (3d Cir. 1990)

[23] *United States v. LA Linsteadt*, 724 F.2d 480,482 (5th Cir.1984).

ers; and companies; treatment of certain items on their tax returns; steps customers took to verify assertions made by the promoters; and the aggregate tax loss associated with the scheme. Petitioners cannot credibly "contend that the IRS could not learn any information from customers that would shed light on whether the BENISTAR 419 plan is an abusive tax scheme. On the contrary; Petitioners are opposing this summons presumably *because* disclosing the customers' identities likely will shed light on BENISTAR"S tax-scheme-promotional activities.

3. *The IRS does not possess the summoned information.*

As explained above, the IRS has been singularly unsuccessful in getting accurate and complete information about the customers' identities. BENISTAR met the IRS; s document requests (know as IDRs) for customer information with a laundry list of objections and privilege claims. Instead of providing the customers' identities and thereby showing that BENISTAR had nothing to hide, BENISTAR's refusal to provide this information forced the IRS to take an indirect route – summoning Wachovia.

Further, to the extent that BENISTAR' s front man Daniel Carpenter has provided copies of some written promotional materials, the IRS cannot rely on Carpenter or BENISTAR as the exclusive source o£ these documents. The IRS needs to independently verify anything given by a possible tax-scheme promoter. A thorough investigation requires no less.

In any event, Petitioners do not claim that the IRS already possesses its customers' identifying information. Instead, Petitioners try to shift focus by claiming that the IRS is abusing its process by repeatedly asking for the same customer identifying information. That argument might have some traction if BENISTAR had repeatedly *produced* the documents in response to the repeated requests. Instead, Petitioners admit (by attaching copies of its IDR responses as Exhibit D to the Petition) that BENISTAR *refused* to produce the requested documents and instead asserted a variety of objections, including a work-product privilege claim, to the IRS's request for BENISTAR's customers' identities. It is hardly "'harassment" to repeatedly ask for information

when a promoter under investigation fails to provide it. Instead, this is precisely what any competent IRS investigator would do when faced with a recalcitrant suspected tax-scam promoter.

4. *All proper procedures were followed.*

Finally, the Servadio Declaration establishes that the IRS followed all the administrative steps required by the Code to issue and serve this summons. Petitioners do not claim that the summons fails to meet the proper procedures for a normal § 6700 summons; instead, Petitioners claim that it is a disguised "John Doe" summons and therefore this summons fails to meet the additional John Doe procedures. *As* explained below, this argument has been directly addressed and rejected by the Supreme Court in *Tiffany Fine Arts.*

Because the United States has proven its *prima facie* case for enforcement, the burden shifts to Petitioners to show that enforcing this summons is an abuse of the court's process. For the reasons discussed below, neither the facts nor the legal arguments raised by Petitioners meet that "heavy" burden.

II.

PETITIONERS' ARGUMENTS LACK MERIT

A. To the extent the IRS may use the summoned information to examine BENISTAR's customers, this is a "'dual-purpose" summons, not a "John Doe" summons, and the additional John Doe procedures are inapplicable.

Petitioners argue that enforcing this summons would be an abuse of the Court's power. They claim that the IRS is not really seeking information here to conduct a Section 6700 investigation of BENISTAR, but in fact seeks Information solely to audit presently-unknown BENISTAR 419 customers. In this vein, Petitioners argue that the IRS is trying - through the Wachovia summons-to circumvent the statute that authorizes summonses to aid in the audit of unknown taxpayers, so-called "John Does." For the reasons discussed briefly below, Petitioners' argument is misplaced.

The IRS must obtain an *ex parte* order before serving a summons that "does not identify the person with respect to whose liability a summons is issued."[24] There is no dispute that no such order was obtained here. But that statute does not apply to this summons. First, the summons identifies Petitioners as the persons with respect to whose liability (§ 6700 penalties) the summons was issued. As explained in detail in the) Servadio Declaration, the IRS seeks detailed financial records in Wachovia's possession concerning the

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[24] 26 D.S.C. §7609(f).

identities and accounts of every BENISTAR 419 customer, so that it can determine whether the plan is an abusive tax scheme. By examining those records and contacting the identified BENISTAR customers, the IRS may be able to determine whether Petitioners have promoted an abusive tax scheme. Because the summons was issued in aid of the IRS's Section 6700 investigation of Petitioners, it does not fall within § 7609(f)'s additional John Doe procedures.

The IRS issued the Wachovia summons to obtain information for its Section 6700 investigation of Petitioners. It is therefore Irrelevant that the summons might also provide information to the IRS that might enable it to identify and audit other taxpayers (BENISTAR customers) whose identities may or may not now be known to the IRS. The Supreme Court in *Tiffany Fine Arts* expressly upheld the IRS's right to issue and enforce a so-called" dual purpose" summons-without first obtaining an *ex parte* order-that seeks potentially relevant information about a taxpayer under audit, even if the summons also requires disclosure of information about unknown taxpayers.[25] Accordingly, the IRS is entitled to obtain all the summoned information from Wachovia, without having to comply with § 7609(f).

Petitioners might try to distinguish *Tiffany Fine Arts* on the ground that there, the IRS issued the summons to the taxpayer under audit, while here, the IRS issued the summons to a third party (Wachovia) that is not under audit. But

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[25] *Tiffany Fine Arts*, 469 U.S. at 324.

that is a distinction without any discernable difference. The Supreme Court explained that it would not require the IRS to obtain court approval for serving a "dual purpose" summons, because Congress enacted § 7609(f) so that there would be somebody in the lawsuit who could advocate for the interests of any unknown taxpayers. Where there is no taxpayer under audit, the court substitutes for the unknown taxpayers through the *ex parte* application process. But where taxpayer under audit is the summoned party, the .Supreme Court reasoned, the taxpayer has an interest in advocating for the unknown taxpayers.

That same reasoning applies here, where there are parties in this lawsuit who not only can, but actually are, advocating for the interests of the unknown taxpayers. BENISTAR even asserts a harassment claim solely on behalf of its customers.[26] For the same reasons that the Supreme Court discussed in *Tiffany Fine Arts*, this Court need not apply the additional procedural safeguards of § 7609(f). This summons was issued in connection with an IRS Section 6700 investigation of specifically identified taxpayers-the Petitioners. Petitioners have ample interest in and desire to represent the interests of the unknown taxpayer-customers whose information is covered by this summons. Under the holding and reasoning of *Tiffany Fine Arts*, the IRS was not required to comply with § 7609(f) before serving the Wachovia summons.

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[26] Petition at 6.

Finally, as mentioned above, the Ninth Circuit has rejected the very "John Doe" argument that Petitioners assert here and enforced a third-party summons to a bank seeking customer information in a Section 6700 case-a case nearly identical this one. *Liberty Financial* demonstrates that a Section 6700-related summons can seek customer information from a bank without complying with the additional John Doe requirements.[27]

B. There Is No "Probable Cause" Requirement for an IRS Summons.

Petitioners further claim that the IRS has "made no *showing* whatsoever that any 'tax shelter' was promoted by any of the Petitioners. . . ."[28] Petitioners then suggest that-merely because BENISTAR bought a favorable opinion letter from a "nationally prominent law firm" - the IRS cannot conduct *any* investigation of their activities.[29] Petitioners cite no cases or statutes to support these contentions; in fact, case law shows that these contentions are absurd.

First, the IRS need not prove that a violation has occurred before issuing a summons as part of an investigation to determine whether a violation has occurred. Petitioners' argument to the contrary would lead to the absurd result that the IRS effectively could *never* issue a summons until a violation was already proved (and then the summons could be

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[27] 778 F.2d at 1393

[28] Petition at 4 (emphasis added).

[29] *Id.*

quashed because the summoned information presumably would already be in the IRS's possession). By arguing that the IRS must first "show" that Petitioners' conduct is subject to penalty under § 6700, Petitioners are trying to modify - indeed, eviscerate - the Supreme Court's four-factor test enunciated in *Powell*. In *Powell*, the Supreme Court directly addressed this issue and held that

> the Government need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process, predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability? [30]

Petitioners have not raised a substantial question that enforcement would be an abuse of the court's process. Further, Petitioners' attempt to rewrite *Powell's* four-part test must fail.

Second, Petitioners falsely suggest that their opinion letter obviates any Section 6700 investigation and therefore any summons here. The IRS and the Court are not obligated to accept the promoter's version of the facts or law, even if the

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[30] *379* U.S. at 51 (emphasis added). *See also United States v. Kaiser*, 308 F. Supp. 2d 946,955 (E.D. Mo. 2004) (taxpayers in Section 6700 investigation who made the same argument "have placed the cart before the horse and ignored the instruction of *United States v. Powell*. . . .").

taxpayer obtained an opinion letter from a "nationally prominent law firm." Far from it; the IRS is entitled to confirm the authenticity of documents and other facts, even if the promoter swears to their veracity in an affidavit.[31] This opinion letter, which concludes that the BENISTAR 419 plan is not an abusive tax scheme, may have some role to play if and when BENISTAR litigates its liability for § 6700 penalties or a § 740B'injunction. But the existence of an opinion letter from BENISTAR'S hired opinion-writers does not preclude the IRS from' conducting its own investigation and reaching its own conclusion. An opinion letter does not operate as a free pass to avoid an IRS investigation, no matter who wrote it.

C. The Summons Is Neither Overbroad nor Indefinite.

Finally, Petitioners argue that the Court should not enforce the summons because it is allegedly "vague, ambiguous, andoverbroad."[32] Petitioners offer no support or explanation for this conclusion. For the reasons discussed below, they are wrong on the facts and on the law.

The "specificity" requirement for an IRS summons is extraordinarily low; The only requirement is that the summons must describe the information sought in enough detail to inform the summoned party of exactly what he is supposed to

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[31] *Cohen*, 306 F. Supp. 2d at 504 (internal citations omitted).

[32] Petition at 6.

produce.[33] This summons describes precisely what records the IRS wants Wachovia to produce. It could scarcely be more explicit. The Court should reject this "vagueness" argument out of hand.

As for the overbreadth argument, Petitioners raise the familiar (and oft-rejected) argument that this is a "fishing expedition." This Court should reject it too.

The courts have described the IRS's summons power as a "license to fish."[34] While this license is not without limit, the courts do not look into whether the IRS seeks to examine a large volume of records. Instead, courts look at whether the records are described in sufficient detail to inform the summoned party of exactly what is to be produced, and whether the summoned records *may be* relevant to the inquiry. The courts have consistently enforced, against challenges for overbreadth, summonses that are definite in nature and finite in scope, and that request records that may be relevant to the IRS inquiry.[35]

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[33] *United States v. Abrahams*, 905 F.2d 1276, 1282 (9th Cir. 1990); *United States v. Wyatt*, 637 F.2d 293,302 n.16 (5th Or. 1981).

[34] *United States v. Luther*, 481 F.2d 429, 432-433 (9th Cir. 1973); *United States v. Giordano*, 419 F.2d 564, 568 (8th Or. 1969), *cert. denied*, 397 U.S. 1037 (1970) ("Secretary or his delegate has been specifically licensed to fish by §7602.").

[35] *United States v. Reis*, 765 F.2d 1094, 1096 n.2 (11th Cir. 1985); *United States v. Lindsteadt*, 724 F.2d 480, 483 n.1 (5th Cir.1984); *United States v. National Bank of South Dakota*, 622 F.2d 365 (8th Cir. 1980).

The IRS is examining whether Petitioners have sold abusive tax schemes, and particularly whether the BENISTAR 419 plan is an abusive tax scheme. Revenue agent Servadio's declaration explains in detail why the IRS seeks this voluminous information, and how that information may shed light on the IRS's Section 6700 investigation. That the information sought may require Wachovia to produce voluminous records should, therefore, have no bearing on whether the IRS is entitled to them. The Court should reject Petitioners' contention that the summons is vague or overbroad.

CONCLUSION

The United States has made a *prima facie* case against quashing the Wachovia summons. Petitioners have not met their heavy burden to establish that enforcing this summons would constitute an abuse of the Court's power. Accordingly, the Court should dismiss the Petition to Quash.

DATE: August 17, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made upon the following through the Court's Electronic Court Filing system, this 17th day of August, 2004.

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENISTAR 419 PLAN,	)	
Petitioners,	)	
v.	)	
UNITED STATES OF	)	Civil No. 04-2494
AMERICA	)	
Respondent.	)	

DECLARATION OF DOMINICK SERVIADIO, JR.

I, Dominick Servadio, Jr., pursuant to 28 U.S.C. § 1746, declare:

1. I am an Internal Revenue Agent employed with the Internal Revenue Service ("IRS"). My post of duty is 212 West Main Street, Suite 201, Salisbury, Maryland. I have been a Revenue agent since July, 1987.

2. In my capacity as a Revenue Agent I am conducting an investigation of possibly abusive tax scheme organized and marketed by Daniel E. Carpenter and his related corporation, BENISTAR, Ltd. (hereinafter "the Promoters"). This type of investigation is commonly referred to as a Section 6700 investigation, named after the Internal Revenue Code ("IRC" or "26 U.S.C.") section that imposes a penalty on promoters of abusive tax schemes. The investigation also may result in, if appropriate, a request to the Department of

Justice to enjoin the Promoters, pursuant to IRC § 7408, from further promoting abusive tax schemes.

3. A Section 6700 investigation is primarily an information-gathering exercise. The IRS must secure information and documents from the promoter and other sources that demonstrate the operation and organizational structure of the tax scheme or plan. In addition, the IRS also must secure information regarding participants in the plan, in part to determine what the promoter told and gave to the plan's participant/customers. The IRS also looks at participants' tax returns as part of its investigation. Interviewing participants and reviewing their tax returns in investigating a possibly abusive tax promotion is necessary in order to: 1) verify whether participants used abusive tax schemes on their tax returns: 2) secure promotional material and testimony about the promoter's tax-related statements; and 3) determine or estimate tax loss caused by the promotion.

4. The Promoters' possibly abusive tax scheme here involves the marketing of two "welfare benefits plans" that purport to be tax-free under the IRC § 419A(f)(6) exception for 10-or-more employer-welfare-benefit plans. They are BENISTAR 419 Plan and Trust, and the STEP Plan and Trust (hereinafter "the BENISTAR plan" or "plans").

5. Welfare-benefit plans are employer-funded plans to which an employer makes contributions to provide benefits to employees such as disability, medical, and life insurance, or supplemental unemployment and severance pay. IRC §§ 419 and 419A limit tax deductibility of welfare-benefit-plan contributions. These § 419-based limitations do not apply to

a fund that is part of a 10-or-more-employer plan that also meets the §419A(f)(6) exception. For this reason the BENISTAR plan is attractive to small-to-medium-sized closely held companies that are seeking a way to avoid paying taxes on distributions to certain employees. My investigation to date reveals that the Promoters market the BENISTAR plan to potential participants with the promise that all contributions to the plans are fully deductible for federal-income-tax purposes.

6. Employers using legitimate welfare-benefit plans that qualify for the § 419A(f)(6) exception can deduct qualifying contributions to the plan in the year made. Further, there are not tax consequences to the covered employees (they do not recognize the contributions as income) as long as they remain enrolled. To qualify for this § 419A(f)(6) 10-or-more employers exception, three factors must be met: (1) the plan must involve the participation of 10 or more employers: (2) no single employer can contribute more than 10 percent of the total contributions to the plan in any given year; and (3) the plan cannot be "experienced rated." A discussion of "experience rated" plans appears in paragraph 12, below.

7. The exception provided by § 419A(f)(6) allows participants (in this case, employers) to deduct all qualifying contributions made to the plan. The BENISTAR plan-which claims to qualify under §419A(f)(6) – is therefore attractive to small and medium-sized closely held companies that are seeking a tax-free or tax-deferred way to distribute income to certain employees. The BENISTAR plans are marketed to potential participants with the promise that all of their con-

tributions to the BENISTAR plans are fully deductible for federal-income-tax purposes.

8. Tax deductions claimed by employers who have contributed to purported welfare-benefit plans that fail to meet the 419A(f)(6) exception are disallowed by the IRS. In addition, covered employees must claim on their tax returns dividend or compensation income equal to employer contributions made on behalf of the covered employees.

9. Contributions from employers who are BENISTAR plan participants (*i.e.*, BENISTAR customers) are processed by the plan administrator, in this case BENISTAR Admin. Services, Inc, which forwards contributions to the plan's trust. A trustee bank (Wachovia in this case) receives the contributions and then uses the funds to purchase life insurance policies that cover the lives of certain key employees (hereinafter "covered employees"). My investigation to date reveals that most BENISTAR plan participants are closely held corporations that are owned by two or three individuals, who typically are covered employees.

10. The IRS has obtained BENISTAR plan and trust documents that outline the operation of the plan and provide for a trust to receive the funds and purchase the policies. An employer becomes a BENISTAR plan participant by executing an adoption agreement, in which employer agrees to pay to BENISTAR or a related entity certain enrollment and administration fees. The trustee bank then uses BENISTAR plan participants' contributions (less any fees) to purchase life insurance policies for covered employees from reputable national insurance companies. They are typically "cash

value" policies that have investment or savings component such as variable life, universal life, or whole life. The BENISTAR plan trust nominally owns the life insurance policies, but covered employees designate a beneficiary.

11. The BENISTAR plans are set up to provide "death benefits" in the form of life insurance. however, in reality, a participant can terminate from the BENISTAR plan at any time and the insurance policies (plan assets), with their accumulated cash value, are distributed to the covered employees, less any applicable fees. The BENISTAR plan whole-life policies appear to be merely temporary repositories for dividends or compensation owed to covered employees, set up to eliminate or defer taxes on that income.

12. Where welfare-benefit plans purchase insurance policies that have cash values or savings components, those purchases are not tax-deductible. Insurance policies with cash values or savings components are "experience rated," and welfare-benefit-plan purchases of experience-rated policies are not tax-deductible. Instead, IRC §419A(f)(6) states that the 10-or-more-employer exception (which makes certain welfare-benefit-plan payments tax-deductible) does not apply to plans that purchase experience-rated policies. A plan that purchased life insurance could only meet the § 419A(f)(6) exception if term life insurance was used exclusively in this plans.

13. The § 419A(f)(6) rules are designed, in part, to prevent taxpayers (employers and employees) from using welfare-benefit plans to set up disguised deferred-compensation accounts that circumvent the IRC's deferred-compensation

limits. As a result, § 419A(f)(6) effectively requires that welfare plans pool (or purchase insurance that pools) contributions and risk (as does any legitimate insurance market). This statutory scheme therefore prohibits employers from setting up distinct savings accounts for each covered employee that masquerade as insurance. Allowing a 10-or-more-employer plan to use insurance contracts such as whole life policies that have cash value that permit employers or employees to "cash in" the policies, would provide a financial incentive for the employer to over-contribute to the plan. Congress designed these rules to prevent this over-contribution incentive.

14. The BENISTAR plan, by purchasing *whole* life insurance for each covered employee, appears to be a savings or deferred-compensation account masquerading as a welfare-benefit plan. Based on the documents the IRS has obtained to date, it appears that BENISTAR maintains records that reflect each participant's contributions to the fund, each covered employee's account value, and any changes in cash value. Thus, there is separate accounting, and no true pooling of assets in a fund, as any legitimate welfare-benefit plan would have. Consequently, it appears that BENISTAR plan participants' contributions are not tax-deductible and covered employees must include any contribution made on their behalf as income on their personal income-tax returns (IRS Forms 1040).

15. In addition, my investigation to date reveals that the contributions made to the BENISTAR plan are generally far in excess of the actual cost of providing current-year term insurance coverage on the covered employee. Therefore, the

contributions would not be considered ordinary and necessary business expenses under IRC Section 162, and for this reason as well are not tax-deductible to the employer/participant.

16. Notice 2000-15, issued in February, 2000, made IRC § 419A(f)(6) plans officially "listed transactions" and characterized them as "potentially abusive tax shelters." Based on the information currently available, the BENISTAR plan appears to be a § 419A(f)(6) plan subject to Notice 2000-15. As such, the Promoters must register the BENISTAR plan, and maintain and produce to the IRS a list of plan participants. But the Promoters here have refused to produce this list, despite an IRS request to do so. Notice 2000-15 states:

> "Transactions that are the same as or substantially similar to transaction described in the list below have been determined by the Internal Revenue Service to be tax avoidance transactions and are identified as "listed transactions" for purposes of §1.6011-4T(B)(2) of the Temporary Income Tax Regulations and § 301.6111-2T(b)(2) of the Temporary Procedure and Administration Regulations. As a result, corporate taxpayers may need to disclose their participation in these listed transactions as prescribed in §1.6011-4T, and promoters (or other persons responsible for registering tax shelter transactions) may need to register such transaction under § 301.6111-2T. In addition, promoters must maintain lists of investors with respect to these listed transactions pursuant to § 301.6112-1T."

17. To date, the Promoters have provided the following information: (1) the basic plan and trust document of the BENISTAR §419A plans; (2) completed IRS Forms 5500 and 1041 for the trust; (3) financial statements: (4) legal opinions; (5) adoption agreements; (6) a fee structure; (7) an operational overview; and (8) marketing and promotional materials. The documents secured by IRS examiners in the four ongoing BENISTAR participant audits are similar to the documents listed above secured as part of the Section 6700 Investigation.

18. The key information that the promoter has refused to provide is a list of current and past participants in the BENISTAR § 419A plans. I sent an Information Document Request (IDR) #1 to the Promoters. One request within the IDR asked the Promoters to "identify all persons who have participated in or who are currently participating in each plan..." In response, the Promoters stated: "BENISTAR objects to this request as it seeks information that is protected by third parties' rights to privacy and seeks information that is protected by the work product, trade secret, or other applicable privilege, seeks confidential and/or proprietary information and seeks information that is irrelevant and immaterial to this investigation and whether the BENISTAR 419 Plan is a plan as described under IRC Section 419A(f)(6)."

19. Based on this response, I, in consultation with my manager, determined to secure this customer-identity information from third parties. The IRS had previously sent the Promoters a third-party notification letter, Letter 3164P, on January 5, 2004. In furtherance of my investigation and un-

der authority of IRC § 7602, on May 17, 2004, I issued a third-party summons to trustee bank that is, or was, a trustee bank for the Promoters' 419A plans. A person with appropriate authority approved and authorized these summonses. The summons was sent by certified mail to Wachovia Bank as trustee. Copies of the summons were mailed to seven notices. All other administrative steps required by the Internal Revenue Code for the issuance of the summons have been followed.

20. The Wachovia third-party summons includes two attachments: Attachment 1 contains definitions for the summons and Attachment 2 contains a list of request documents. The information requested in Attachment 2 is designed to identify the participants in the Promoters' BENISTAR plans. The information requested also is designed to elicit the amount and dates of contributions to the plan's trust accounts, and the trust's use of those contributions. None of this information is in the possession of the IRS because the Promoters have refused to provide it.

21. The documents and information that the IRS seeks from Wachovia Bank would shed light in regard to the names and numbers of participants in the Promoter's BENISTAR plans, the dates and amounts of contributions to the plans, how the contributions were invested, and will also enable on their tax returns; 2) secure promotional material and testimony about the promoter's tax-related statements; and 3) determine or estimate tax loss caused by the promotion.

22. As of the date I issued these summonses, no "Justice Department referral" was in effect with respect to any of the Promoters. More specifically, the Internal Revenue Service has not made a recommendation to the Department of Justice for a grand jury investigation or criminal prosecution of any of the Promoters, for the tax scheme under examination. The Internal Revenue Service also is not delaying a recommendation to the Department of Justice in order to collect additional information. Moreover, the Department of Justice has not made any request under IRC § 6103(h)(3)(B) for the disclosure of any return or return information (as those terms are defined in IRC § 6103(b)) relating to any person about whom the summonses seek information.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 16, 2004.

_____

Dominick Servadio, Jr.
Salisbury, Maryland

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANCHEZ & DANIELS, et al.,)	
Plaintiffs,	) No. 03 C 1550
v.	) Chicago, Illinois
WAYNE BURSEY, et al.,	) October 7, 2003
Defendants.	) 2:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
MATTHEW F. KENNELLY

APPEARANCES:

For the Plaintiffs: SANCHEZ & DANIELS
333 West Wacker Drive
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Chicago, IL 60606, by
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For the Defendants: FREEBORN & PETERS
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MR. CHARLES W. WEBSTER

AXINN, VELTROP &
HARKRIDER, LLP
90 State House Square
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MR. RICHARD S. ORDER

Court Reporter: LAURA M. BRENNAN
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(The following proceedings were had in open court:)

THE COURT: 03 C 1550, Daniels v. Bursey.

Can I have the lawyers who are here and want to have their appearances on the record tell me who they are?

MR. WINTERS: Mark Winters for plaintiffs.

MR. KORESKO: John Koresko, your Honor, for the plaintiffs.

MR. WEBSTER: John Webster for the administrative defendants.

Your Honor, I also have Mr. Richard Order.

THE COURT: Richard?

MR. WEBSTER: Order, O-r-d-e-r.

THE COURT: Thanks.

He is from the out-of-town firm?

MR. WEBSTER: Yes. He is from Connecticut, and we had filed an application to have his appearance.

THE COURT: You know. I don't really keep track of when I sign those things. The paper flow is they come through the Clerk's office after they have the Paid stamp on them. It doesn't matter. He can participate.

MR. WINTERS: We have no objection.

THE COURT: That is fine.

Before we get to what we are here for, I need to deal with this correspondence I got yesterday, and I am going to deal with it very simply. Stop sending me letters, okay. If anybody wants to make a request, the proper way to do that is by motion, not by a letter. And on this one my advice to Mr. Koresko is don't bother filing a motion, okay.

How many witnesses are we going to have at this point?

MR. WEBSTER: I believe five total, Judge.

THE COURT: How many on your side?

MR. WINTERS: Three.

THE COURT: Who are they?

MR. WINTERS: Manuel Sanchez, John Daniels, Timothy Hoffman.

THE COURT: Okay, and on your side, Mr. Webster, it is Mr. Robinson and Mr. Trudeau?

MR. WEBSTER: Yes, your Honor.

THE COURT: All right. I have reread the briefs. I don't really need opening statements unless somebody has some burning desire to give one. I am prepared to just go ahead and start with witnesses.

MR. WINTERS: We are ready to proceed:

MR. WEBSTER: Yes, your Honor.

THE COURT: Call your first witness.

MR. WINTERS: The plaintiffs call Manuel Sanchez.

(Witness sworn.)

THE COURT: One second here.

(Brief interruption.)

THE COURT: Okay, go ahead.

MANUEL SANCHEZ, PLAINTIFF'S WITNESS,
DULY SWORN
DIRECT EXAMINATON

BY MR. WINTERS:

Q. Mr. Sanchez, what is your current job title?

THE COURT: Why don't you ask his name.

MR. WINTERS: Sorry.

BY MR. WINTERS:

Q. Could you please state your name for the record?

A. Manuel Sanchez. I am know as Manny Sanchez.

THE COURT: You don't need to lean into the microphone.

Spell your name, please.

THE WITNESS: S-a-n-c-h-e-z.

BY MR. WINTERS:

Q. What is your current job title?

A. I am a founder and managing partner of Sanchez & Daniels.

Q. I would like to show you what we will have marked for identification as Exhibit A. It is a fax sent to our attention from defendants' counsel on June 27th of 2003.

I will ask you: Do you recognize that document?

A. I do.

Q. Is that an offer that was made with respect to the Sanchez & Daniels plan participants on June 27th, 2003?

A. Yes, it is.

Q. What was the dollar amount of the written offer that was made?

A. I believe the written offer was $393,940.14.

Q. Did you subsequently participate in a private settlement conference on July 1st of 2003?

A. Well, with the attorneys and Mr. Robinson on one side and the partners on my side, yes.

Q. Who was present on behalf of -- strike that.

Who was present from the Sanchez & Daniels law firm?

A. Well, I was there; my partners, Jack Daniels and Tim Hoffman, were there; and you were there as the attorney for the class.

Q. Who was present on behalf of Benistar or the administrative defendants as they call themselves?

A. Mr. Webster; Mr. Trudeau, I believe; and Mr. Jackie Robinson.

Q. Were opening statements or comments made when the conference began?

A. I don't know about opening statements, but initially it was made clear that the negotiations were going to be about the seven Sanchez & Daniels participants; i. e., Jack, Ordonez, Mary Obrzut, Diane Huntley, and I think I am forgetting one; there were seven of us. And it was made crystal clear, and everybody assented, that this was a discussion about whether or not Benistar and the seven of us could reach an accord.

THE COURT: You know, as the fact finder here, I will be honest with you, telling me what was made clear is not particularly helpful. What I want to know is who said what and when.

THE WITNESS: That is fine. Okay.

BY MR. WINTERS:

Q. Who made a comment with respect to negotiations regarding class?

A. You started out.

Q. What comments do you recall being made with respect to comments about the class?

A. Well, not verbatim, but you made it clear that this was not a discussion about settling the class plaintiffs' action. This was a discussion or negotiation about the seven participants and Benistar, period.

Q. Did anyone else make -- strike it.

Do you recall anyone else making any statement with respect to negotiations regarding class?

A. Yes. Jack then spoke out and said -- .

Q. To the best of your recollection, what did Mr. Daniels state at that meeting?

A. He essentially echoed what you said, that we could not and would not negotiate on behalf of the class but we would on behalf of the participants.

And, frankly, I remember echoing that comment; verbatim, I don't recall, but something to the effect, yes, this is about us; i.e., the seven participants of Sanchez & Daniels, and I said that, and I recall saying that to Mr. Robinson and to Mr. Trudeau and to Mr. Webster.

Q. At any time did anyone from the other side, specifically Mr. Webster, Mr. Trudeau or Mr. Robinson, condition the settlement negotiations upon dismissal with prejudice of the purported class?

A. No.

Q. Approximately how long -- strike it.

What time did the meeting begin that day?

A. It was about 1:00 o'clock.

Q. Approximately how long did the meeting last?

A. Until --

Well, the secretaries were leaving. So it was about 5:00 o'clock.

Q. Did there come a point in the negotiations when it seemed that there was going to be no agreement?

A. Well, there came a point where we had an impasse, if you will, yes.

Q. At the point of the impasse, what was the offer on the table at that time?

A. I believe the offer was the -- what is referred to as the amount of the checks received by the plan from Prudential on nonsevered employees, in other words, the full $492,425.18.

THE COURT: What was it again, the amount of checks received? Say it again.

THE WITNESS: By the plan from Prudential on non-severed employees.

THE COURT: Okay, thank you.

THE WITNESS : That is the seven of us, your Honor. That total was 492 dollars 425 and 18 cents.

THE REPORTER: $492?

BY MR. WINTERS:

Q:Just so it is clear, you said $492- --

THE COURT: Say it again.

$492,425.18?

THE WITNESS: Yes, your Honor. That is it. Thank you.

BY MR. WINTERS:

Q. At that time did the Sanchez & Daniels plan participants agree to accept that dollar amount?

A. No. In fact, we rejected it.

Q. After that dollar amount was rejected, what happened next?

A. Well, then Mr. Robinson asked if we could talk in private.

Q. When you say, "we could talk, II who are you referring to?

A . If I could talk to Mr. Robinson alone.

Q. Did you have the approval from plaintiffs' counsel namely, myself, to engage in that conversation?

A. Well, I asked you and I asked Jack and I asked Tim if it was all right to do that, and~ yes, you agreed it was.

Q. Did you and Mr. Robinson then have a conversation?

A. We did. We walked back to my office, which is just about 15 feet off the main conference room, closed the door, and had that private conversation in my office.

Q. As part of that conversation, as best as you can recall, what did Mr. Robinson say to you and what did you say to Mr. Robinson?

A. Mr. Robinson said something to the effect of, hey, this is silly. You want to get this settled, I know you do, and

I want to get this settled. This is ridiculous that we are going to walk away and not have this thing settled.

And I said, I agree, I want to get it settled, but we are not going to do it for $492,000 and change, not when we have a surrender value of 673,000 and change. I said, that makes no sense.

And he goes: Well, look, is there a meeting ground? Is there -- in your view, is there away we can get off – he didn't use the word "impasse," but to me it was, could we get off the impasse. And I said, not if you are going to stand, as you said you were, last best offer 492, we are not.

And then he said: Can we split the difference?

I had a little Palm with a calculator component, and I just took the $673,835.87 and minus the 492,425, and I believe it came out to 533 and change, and I just wrote -- 583 and change, and I wrote it down right in front of Mr. Jackie Robinson.

I said: So we are talking about 583,000 and change? He goes: Yes, we are.

I said: I have to talk to my partners.

Q. Are you referring to handwritten notes when you made that last comment?

A. Yes, I am.

Q. Did you make those notes contemporaneous with the meeting in private with Jackie Robinson?

A. I did.

MR. WINTERS: We would like to offer as Exhibit D, your Honor, the one-page notes made in the private conference meeting between Mr. Sanchez and Mr. Robinson.

THE COURT: Have you seen it, Mr. Webster?

MR . WEBSTER: Your Honor, I have seen it, but I can't tell if all these were made at the time.

THE COURT: Why don't you lay some more foundation, Mr. Webster, and then you can offer it.

BY MR. WINTERS:

Q. At what time did you make these notes, Mr. Sanchez?.

A. The notes at the bottom of that line that you see in the center were made in the presence of and during the meeting with Jackie Robinson where it starts out, "Final Offer.

Q. So that - -

THE COURT: The notes below the line?

THE WITNESS: Yes, below the line here in the center of my yellow sheet, which I still have the original of.

BY MR. WINTERS:

Q. That is the original copy in your hand, correct?

A. It is.

MR. WINTERS: We would move to admit Exhibit B.

THE COURT: Is there an objection to Exhibit B, Mr. Webster?

MR. WEBSTER: No, your Honor.

THE COURT: It is admitted. The other exhibit is exhibit number?

MR. WINTERS: It is the fax correspondence.

THE COURT: What was the letter you gave to it, the fax?

MR. WINTERS: A, as in Adam, your Honor.

THE COURT: Okay, thank. you.

BY MR. WINTERS:

Q. You stated you had a calculator in the office with you, Mr. Sanchez, correct?

A. It was a Palm -- a Palm PDA with a calculator component which I had on my desk, and I used the calculator component of the Palm.

Q. What you essentially did was take the amount of money that was placed into the plan -- or strike that -- that was paid by Prudential to Benistar, $673,835.8 added to it the checks received by the plan from Prudential for the non-severed employees, which was $492,425.18, and divided that by 2, correct?

A. No.

MR. WEBSTER: Your Honor, I must object to the form of the question.

THE COURT: It is leading. The objection is sustained.

BY MR. WINTERS:

Q. How did you calculate?

A. Thank you. I took what I am calling the surrender value, $673,835.87, which; incidentally, was on the fax that they had provided to us from Freeborn & Peters, and I subtracted from that $492,425.18, which I identified for the Court as the amount of the checks received by the plan from Prudential on nonsevered employees; and that came out to $583,000 and change.

Q. Did you tell Mr. Robinson what the calculation total was?

A. Yes. What I did was I took half of the difference between $673,835.87 and $492,425.18. Half of the difference got us to the number of $583,000 which I wrote down and which Mr. Robinson acknowledged was correct, 583,000. I didn't put the change part on.

Q. What did you do next?

A. I said I had to talk to my partners.

Q. Then what happened?

A. Then I went and I looked in the conference room for Jack and Tim. I think Tim was there. You may even have

been there, but Jack wasn't. So we all went down to Jack's office.

Q. What happened when the four individuals went down to Jack's office?

A. Well, I think we used the small conference room right next to Jack's office, and I said to Tim and Jack: Look, we have an offer. They are essentially splitting the difference between the surrender value and what we seven paid in. It comes out to -- I said $588,000. I had just misspoken, but T did, in fact, tell them 588.

And we talked, you know, does it make sense to do this, et cetera. And Tim and I essentially said, look, if we can just be done with this, put this behind us, Jack, we ought to just take it, and Jack agreed.

So I got their agreement to settle for $588,000.

Q. And did an attorney for the remaining four plan participants; namely, myself, agree to the remaining portion?

A. Well, you were there. You were there, that is correct. Then we went back to the conference room.

Q. When you returned to the conference room, what happened?

A. I said, Jackie, we have got a deal at $588,000, and then I was immediately corrected, either by counselor by Jackie, you mean 583.

And I said, I am sorry, and I looked at Jack and Tim, and I had told them 588. I said, Jack, Tim, I misspoke, it was –

because then I went to my yellow sheet and said, hey, it is 583, and they agreed, and then Jackie said, we got a deal, and I agreed, we got a deal.

Q. You were making a motion. Did you shake hands?

A. We literally shook hands.

Q. What happened after you shook hands?

A. Well, then we talked about, okay, now, do we call Judge Kennelly, do we let him know that the case has been settled, and I don't know if -- I think it was Mr. Robinson; I could be wrong; it may have been Mr. Webster -- somebody said, well, you know, we brought a memorandum to reflect our settlement. And I viewed it at the time as just being, you know, a perfunctory thing like you do whenever you settle cases. You just want some written confirmation that you have settled the case.

MR. WINTERS: Your Honor, may I approach the witness?

THE COURT: You don't need to ask.

BY MR. WINTERS:

Q. I am showing you what I will mark as Exhibit C. Do you recognize that document?

A. I do.

Q. What is it?

A. It is entitled Agreement in Principle. It is the document that was handed to you, pot to me, in the conference

room because I really didn't even need to see it. I said I don't need to see it. We have got a deal. Let's just get this behind us.

Q. Prior to the time that you shook hands with Mr. Robinson had you ever seen that Agreement in Principle document?

A. No.

MR. WINTERS: Your Honor, I would move to admit Exhibit C.

THE COURT: Any objection to C?

MR. WEBSTER: No, your Honor.

THE COURT: C is admitted.

BY MR. WINTERS:

Q. The first paragraph -

If you could, for the Court, read what the first paragraph of the Agreement in Principle states?

A. It says:

"John Daniels, Manuel Sanchez, Tim Hoffman, Diane Huntley, Joseph Bonaccorsi, Mary Obrzut, Edward Ordonez, and Sanchez & Daniels individually and on behalf of the purported Sanchez & Daniels step plan' and the purported 'Sanchez & Daniels step plan participants' (collectively the plaintiffs) have agreed with Wayne Bursey, Daniel Carpenter, Step Plan Services, Inc., Benistar Administrative Services, Inc., Benistar Insurance Group, Inc., Mellon Trust

of New York, and Teplitzky & Company (collectively the administrative defendants) to settle all claims and counterclaims asserted in or that could have been asserted based on the facts alleged in Sanchez, et al. v. Bursey, et al., U.S. District Court for the Eastern District of Pennsylvania, civil action number 02 CV 8213 (the Pennsylvania action) and John Daniels, et al. v. Bursey, et al., United States District Court for the Northern District of Illinois, civil action 03 CV 1550 (the Illinois action) on the following terms. "

Q. What is the first term?

A. "Number 1. The administrative defendants shall make the payment of blank dollars in the aggregate to the seven individual plaintiffs in the Illinois action on a pro rata basis. Payment is conditional upon and shall be made promptly after Court approval of the dismissals with prejudice of the Pennsylvania and Illinois actions without notice to any proposed class."

Q. At any time before reading what marked as Exhibit C, had anyone from the administrative defendants made any comments to you or placed any condition upon your negotiations that would require a dismissal with prejudice without notice of the Pennsylvania class?

A. Absolutely not.

Q. At any time prior to your seeing Exhibit C after you shook hands, did any of the administrative defendants or representatives place any condition upon the settlement terms requiring dismissal with prejudice of the Illinois action without notice to any proposed class?

THE COURT: Exhibit C is the document you -

THE WITNESS: Oh, this is Exhibit C because it says Exhibit D here, okay.

Exhibit C, okay. No.

BY MR. WINTERS:

Q. When was the first time you heard that there was a condition that either of the class actions would have to be dismissed with prejudice and without notice as a condition of the settlement dollar amount?

A. After we settled the case.

MR. WINTERS: Those are all the questions I have. Thank you.

THE COURT: Mr. Webster or Mr. Order.

CROSS EXAMINATION

BY MR. WEBSTER:

Q. Mr. Sanchez, do you mind if I call you Manny?

A. No, I don't.

Q. Thanks.

Manny, when you and Mr. Robinson retired to have your private meeting -

A. Yes, sir.

Q. -- directing your attention to that meeting, was there any discussion as to what the administrative defendants would receive in return for the payment of $583,000?

A. No.

Q. After you shook -- or after Mr. Robinson shook your hand, was there a discussion with respect to the class issues of dismissal of both the Pennsylvania and Illinois class actions without notice and with prejudice?

A. When Mark told me that was part of the terms in the document, that I didn't feel I needed to look at, but he said it was contained in what today is being called Exhibit C.

Q. The meeting -- the entire meeting took a little over four hours?

A. I believe so, yes. It may be closer to four and a half even.

Q. When you retired –

How much time had expired when you retired with Mr. Robinson?

A. We were probably in there five minutes maybe.

Q. At what point in the overall four and a half hours did that take place?

A. After we reached what I am calling an impasse, maybe four hours into it, three and a half.

Q. So -

A. Approaching 5:00 o'clock, I remember.

Q. I understand that.

Approaching 5:00 o'clock is when the overall meeting ended.

After Mr. Robinson and you shook hands, was there further discussion on class issues?

A. The overall meeting ended some time after 5:00 o'clock, and I believe that after we shook hands, for the first time when Mark brought it to my attention after I believe you handed to him --Manny, you have got to look at this, we can't sign this.

Q. Who was in the room at that time?

A. I know I was. I believe Jack was there. I believe Tim was there. I know they were because they came back from the office next to Jack's to return to the conference room to say, we have got a deal.

Q. I agree, and I was there, too, correct?

A. Yes, sir, and Mr. Trudeau was there, and so was Mr. Robinson.

Q. Mr. Jack Robinson?

A. Yes.

Q. Isn't it true that there was a discussion with respect to the class issues?

A. There was no discussion with respect to the class issues until after we made a deal and either you or Mr. Robinson said, well, we have got a memorandum to reflect our deal.

Q. After the handshake, was there a discussion with respect to the class issues?

THE COURT: Do you mean at any point after the handshake, or do you mean immediately after?

MR. WEBSTER: I mean immed- -- following thereafter, your Honor.

BY THE WITNESS:

A. Immediately following thereafter, no. Thereafter, yes, you or Mr. Robinson handed me this document -- handed Mark the document.

BY MR. WEBSTER:

Q. Immediately after the handshake, was the document placed on the table and did a discussion ensue?

A. Immediately after, no.

Q. How much time elapsed?

A. Well, after we celebrated, hey, it was worth it, all these hours we put together, I am going to say five minutes maybe.

Q. Five minutes after the handshake, the draft Agreement in Principle appears and there is a discussion, true?

A. Yes. You pulled it out, true.

Q. And there was a discussion with respect to the class issues, true?

A. I guess, yes. That qualifies as a discussion, yes.

Q. Isn't it true that, for example, I said that there was a line -- a whole vein of case law that class actions in the pre certification stage in particular could be dismissed without notice to the proposed class?

A. You said that after we raised the objection about what are you talking about; we are not talking about the class.

Q. And wasn't there a discussion on that point and wasn't there disagreement; for example, Mr. Daniels disagreed with that?

A. Yes.

Q. And didn't Mr. Winters voice ethical -- what he expressed as ethical concerns on whether or not a class could – a proposed class action could be dismissed without notice?

A. You guys were arguing that, that is correct, after we had a deal.

Q. So isn't it true that you didn't just say, we already have a deal, what are we talking about this stuff for?

A. Could you repeat the question? I didn't catch the question, John.

Q. I understand. Isn't it true that as this discussion of the class issues is taking place, isn't it true that you did not stand up and say, why are we talking about this, we already have a. deal?

A. I believe I said something to that effect.

Q. What was the position of Mr. Robinson or Mr. Trudeau?

A. I believe you were speaking for them at the time, and you bad said, well, look, in the Northern District, this is commonly done, we can get this thing resolved. And I am asking: Why are we even talking about this because, for the first time now, I am looking at this because here we have a deal and you are bringing in the class, and the class wasn't part of the deal?

Q. Well, your action was a proposed class action under Federal Rule of Civil Procedure 23, was it not? Yes, sir, it was.

Q. And dismissal of a proposed class action requires judicial approval?

A. I believe that is hornbook law.

Q. And isn't it true that there was a substantial discussion with respect to these class issues after you and Mr. Robinson had your discussion with respect to financial terms?

A. After we settled the case, you all had that discussion that you are referring to right now, true.

Q. I understand it is your view that the case was settled, and I will leave that conclusion aside for the moment. I just want to get the facts.

A. Okay.

Q. This discussion with respect to the class issues, how long did it take?

A. Maybe 10, 10, .15 minutes max.

Q. Are you sure it didn't take a lot closer to over an hour?

A. I am sure.

I don't believe you guys left our office at 6-something.

Q. But the discussion took a lot longer than 10 minutes?

A. I don't believe so. I said that is my best estimate, sir. I can't -- you know, I didn't have a stopwatch on at the time.

Q. Did Mr. Daniels look at you and say, Manny, you don't have a deal,- at any point in any context?

A. He said, if we sign this, that is absurd, we can't, there is no deal. If we have to sign this, the document you handed to us, and this is just a copy of it, we don't have a deal, that is right.

Q. After that, after Mr. Daniels' expression, did you express whether or not it was possible to have a deal at this point?

A. I believe Tim did. I believe that I -

Somebody suggested, let's call the Judge, because you had raised the question about what he could or couldn't do, and we are still settled, but we need to get the guidance from the Court, and we couldn't reach him, as I recall.

Q. Did Mr. Daniels express the thought that because of the stumbling block of the class -- excuse me. I withdraw that.

Did Mr. Hoffman, did Tim Hoffman, express the thought that because of the issues, the class issues and the disagreement on those, that perhaps we should visit the Judge and maybe work through those to save the deal?

A. Something to the effect of, we ought to get the Judge involved in the legal issues that you and Jack and Mark were disagreeing on.

THE COURT: She doesn't mark them. You do that, and you keep them.

What are you going to mark this?

MR. WEBSTER: D, as in David.

THE COURT: This is Defendants' Exhibit D.

MR. WEBSTER: I thought we would make them all joint exhibits.

THE COURT: No, that was exhibit something.

MR. WEBSTER: That was D. It got turned into C. Why don't we make this Defendants' 1, your Honor.

THE COURT: Okay, go ahead.

BY MR. WEBSTER:

Q. Manny, I would like to show you what has been marked as Defendants' Exhibit 1 and ask you to briefly take whatever time you need to review it.

A. Thank you.

(Brief interruption.)

MR. WINTERS: Your Honor, I object because this is a -- the document is not relevant to the discussions that occurred on July 1st.

THE COURT: Well, I am going to wait and see. There is no jury in the box here. I am going to wait and see how the questioning goes, and I will take it subject to a motion to strike.

MR. WEBSTER: I just want to ask him some foundation questions.

(Brief interruption.)

THE WITNESS: Yes, sir. What is the question?

BY MR. WEBSTER:

Q. Have you had a chance to review the document?

A. I have.

Q. This purports to be a letter, a settlement demand letter, over the signature of Mark Winters, your counsel?

A. Yes, sir, it is.

Q. Did you as the principal in Sanchez & Daniels and the lead plaintiff authorize Mr. Winters to conduct and to make settlement demands and conduct negotiations?

A. I believe that we were asked by the Court to make a formal demand, and this was that response to that, and I saw it before it went out, yes.

Q. Did you approve of it?

A. Yes, I did.

MR. WEBSTER: Your Honor, I would like to move -

THE COURT: I am going to let it in, and if something it is admitted over objection. If it becomes evident that it is not relevant, you can make a motion to strike.

MR. WEBSTER: Thank you, your Honor.

BY MR. WEBSTER:

Q. Manny, directing your attention to the sentence in the first full paragraph that begins with "additionally"--

A. Yes, sir.

Q. -- could you read the sentence there beginning with, demands are made on"?

A. "The demands are made on behalf of members of the putative class of former and present participants as well as the class of employers who have contributed to the step arrangement. II

Q. Was it your -- strike that.

Were the plaintiffs -- were you, the Sanchez & Daniels participants in the plan, at this negotiating on behalf of the entire plan?

Strike that..

A. I am sorry. I don't understand the question.

Q. Strike it.

Did the Sanchez & Daniels plaintiffs make a demand on behalf of the would-be class in its entirety?

A. In this June 6th, 2003 formal written demand, yes, that was made on behalf of everyone.

Q. Directing your attention -- excuse me.

(Brief interruption.)

BY MR. WEBSTER:

Q. Manny, I am directing your attention to the July 1 settlement, the conference at your offices that you spoke at length with Mr. Winters about?

A. Yes.

Q. You testified that you made a statement at the beginning that you were there to settle the case on behalf of the seven Sanchez & Daniels participants?

A. Right. It originally was nine, but it was seven at that time.

Q. Okay, and were statements made by myself in that regard?

THE COURT: You mean at that point?

MR. WEBSTER: At that point.

THE COURT: Okay.

BY THE WITNESS:

A. Yes, you said fine.

BY MR. WEBSTER:

Q. Did I say anything that we were there to settle the entire case, both in Pennsylvania and Illinois, all of them in their entirety?

A. No.

Q. Did Mr. Robinson or Mr. Trudeau make any statements at this point in time on this issue?

A. Not that I recall.

Q. Would it be fair to say that based on the Agreement in Principle -

A. Exhibit C?

Q.-- Exhibit C, that the administrative defendants were negotiating on the basis that, in exchange for the payment, there had to be resolution of the class issues with respect prejudice "and notice in both Pennsylvania and Illinois?

A. No; it would not be fair to say.

Q. What makes you say that?

A. Because on the front end of our four-hour-plus conversation, it was made clear that we were only talking about settling the seven of us and Benistar, and that was it. That was made crystal clear, and you guys assented.

Q. Three and a half hours of discussion took place after that?

A. Yes.

Q. And many things were said?

A. Well, yes, a lot things took place in three and half hours, but it all had to do with how much we paid in, how much the surrender value was, what you guys would do at your best above and beyond that 383 that you started with, et cetera.

Q. And if there were no agreement with respect to the financial numbers, then there could be no agreement at all, could there?

A. As to the seven of us, that is correct.

Q. As to anything?

A. No, because anything wasn't on the table. The seven of us were on the table, period.

Q. Are class actions settled in that fashion in your experience?

THE COURT: What fashion are we talking about?

MR. WEBSTER: Where the lead plaintiffs come in and simply announce that they are only going to settle for themselves as though it were a case between those seven and the defendants.

MR. WINTERS: I object to form and foundation.

THE COURT: Overruled.

BY THE WITNESS:

A. You are asking the wrong guy, Charlie, because I don't know. I am not a class action attorney.

BY MR. WEBSTER:

Q. Are class actions not essential or are class allegations not essential -- strike that. Isn't it true that class .allegations are essential to a class action suit?

A. Yes, and I learned that in University of Pennsylvania law school.

Q. Weren't you filing a case on behalf of the entire class?

A. Yes, we were. We were doing that. I wasn't myself, but we were doing it as class plaintiffs.

Q. Well, who was -

A. Mr. Koresko and Anderson, Kill before I think you moved to disqualify them or they withdrew, or I think they had a conflict of some sort that came up. His Honor is familiar with this after the fact, and I will confess I was not and

am not and I doubt in my career I will be a class action lawyer.

Q. Doesn't your complaint say that you are bringing the action on behalf of the class?

A. It most certainly does.

Q. Quickly, Manny, -

A. Yes.

Q. -- I would like to show you what has been marked as Defendants' Exhibit 2.

THE COURT: Just give him 2, and he can hand me one.

That way you don't have to reach over.

(Brief interruption.)

THE WITNESS: Okay, Charlie, I read it.

BY MR. WEBSTER:

Q. Do you recall seeing that?

A. I believe Mark showed me this shortly after it came into the firm.

MR. WINTERS: Your Honor, I object, not relevant after he fact.

THE COURT: Overruled.

I assume you are offering it?

MR. WEBSTER: Yes, your Honor.

THE COURT: It is admitted over objection.

BY MR. WEBSTER:

Q. Directing your attention to the last paragraph, -

A. Okay.

Q. -- do you see where it says that, in view of this, there is no reason to go to Judge Kennelly to discuss the class issues?

A. That is what it says, sir.

Q. Did you authorize Mark to send a letter in response to that?

A. In response to this July -

Q. Yes

A. I don't recall authorizing him to do anything.

Q. Did the plaintiffs fire off a letter and disagree with the characterization that there is no reason to go to Judge Kennelly to discuss class issues?

A. I don't know that we did or didn't, Charles.

Q. That letter states that the settlement offer had been withdrawn, does it not?

A. On page 2 at the top, it literally says, all previous offers to settle this litigation are withdrawn. I mean, that is

what prompted this whole thing because you can't withdraw something after it is settled.

Q. How in your mind would you as a plaintiff settle a case that is not brought by yourself but is brought on behalf of a whole class without including a resolution of the class issues?

A. May I answer that?

Q. Sure.

A. When I am asked if we are willing to negotiate and I set forth on the front end, I am willing to negotiate on behalf of the seven participants of the plan in my firm, and the defendants agree, fine, that will be the discussion that will take place, the seven of us and Benistar -- when you agreed to that, then I said, fine. I felt very comfortable doing that because that is what I have been doing my whole life. I have not been doing class actions, and I don't pretend to be a class action lawyer.

MR. WEBSTER: Your Honor, I must move to strike that answer. I don't think it is responsive at all.

THE COURT: Put your question again.

The question was basically how would one go about settling an action in which allegations are made on behalf of a class, right?

MR. WEBSTER: Without dealing with -

THE COURT: Without dealing with the class issues. Please answer that. It is essentially an abstract question, not a

question that invites you to give your argument again, Mr. Sanchez, with all due respect. So just answer it.

THE WITNESS: Your Honor, when I -- I would not purport to settle, and we made it clear we were not talking about settling of the class. So to me, I mean -

THE COURT: He is asking you what amounts to a hypothetical question.

THE WITNESS: Correct.

THE COURT: Can you answer the hypothetical?

THE WITNESS: I cannot.

THE COURT: That is because you don't have sufficient expertise?

THE WITNESS: That's correct. I confess that.

THE COURT: Move on, Mr. Webster.

BY MR. WEBSTER:

Q. Would it be fair to say, Manny, that the administrative defense, Mr. Trudeau and Mr. Robinson, didn't think they had a deal in view of a discussion that followed in connection with the Agreement in Principle and its statement of settlement upon dismissal of the Pennsylvania and Illinois class actions without notice?

A. No, it wouldn't, at least as to Mr. Robinson. I cannot speak to Mr. Trudeau –

MR. WINTERS: Objection.

THE COURT: Overruled.

THE WITNESS: -- because he didn't say anything~

MR. WEBSTER: Nothing further at this time.

MR. WINTERS: Very briefly.

THE COURT: Mr. Winters.

MR. WINTERS: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. WINTERS:

Q. Manny, Defendants' Exhibit 1, the June 6th, 2003 letter, that is a demand made in response to a request by the Court, correct?

A. Yes.

Q. And on June 26th, 20031 did I advise you that I had a telephone conversation with the Judge wherein he 'had advised that we should have a private settlement negotiation?

A . Yes.

THE COURT: Who was on this phone conversation?

MR. WINTERS: I believe you were, your Honor.

THE COURT: You don't want to leave the impression that this is a phone conversation that you and I had, which is what your question -

MR. WINTERS: I apologize, Judge.

BY MR. WINTERS:

Q. Manny, were you advised that there was an all-party telephone conference, status conference, on June 26th?

A. Yes.

Q. After that status telephone conference, were you advised by me that the Judge wanted us to have a private settlement negotiation?

A. Nevertheless, yes.

Q. Did we thereafter receive the fax that I marked as Exhibit A from Freeborn & Peters dated June 27th, 2003?

A. Okay, I have got it here. Yes, indeed.

Q. In that fax of June 27th, 2003, an offer is made to the seven individual plan participants from Sanchez & Daniels in the amount of $393,940.14?

A. Yes, sir.

Q. Is there any conditioning in that letter of June 27th, 2003, that the class be dismissed in either Illinois or Pennsylvania to accept the dollar amount made on behalf of the seven individual participants?

A. No, sir, but it you want me to look at the four pages again, I will read it through its entirety.

May I, your Honor?

THE COURT: That is fine.

(Brief interruption.)

THE WITNESS: That is correct. There is no reference~

BY MR. WINTERS:

Q. In return for the offer of $583,130.53, were you willing to execute a general and mutual release with respect to yourself individually and all defendants in this case?

A. Yes.

Q. Was that the position of the six remaining Sanchez & Daniels plan participants other than yourself, when the offer was accepted?

A. Yes.

MR. WINTERS: That is all I have. Thank you.

THE COURT: Mr. Webster, anything else?

RECROSS EXAMINATION

BY MR. WEBSTER:

Q. Manny?

A. Yes, sir.

Q. Quickly, the June 27thl 2003 letter that you -

THE COURT: The one you were just looking at?

BY MR. WEBSTER:

Q. The one you were just looking at and asked about?

A. Yes.

Q. Did you accept that offer of $393,940, or was it rejected?

A. We did not accept that.

Q. So it was rejected?

A. Yes, sir.

Q. Is that a yes?

A. Yes, sir. It was rejected at our conference room.

MR. WEBSTER: That is all, your Honor.

THE COURT: I recognize that you are not a class action attorney, but as you understood it from what you were told at the meeting after the document was put on the table and then described to you, what did you' understand the problem to be with disposing of the class allegations in the manner that was proposed?

THE WITNESS: Twofold, your Honor.

One, we were not ever negotiating on behalf of the class, just on behalf of the seven of us. So I had that as the initial problem. Where is this coming from? We have already settled this. Nobody talked about the class.

Secondly, there was a provision in that document, which was marked as Exhibit C, which, not because I am a class action lawyer because I am not, but because my visceral re

action to something that says without notice to any proposed class didn't seem, viscerally speaking, appropriate.

THE COURT: Okay. I take it that if only the claims that your law firm and the members of the law firm were making against the administrative defendants who were dismissed, in other words, if you had settled it on the terms that you have testified that you believe you reached a settlement -

THE WITNESS: Yes, sir.

THE COURT: -- that would have still left the class allegations against the administrative defendants?

THE WITNESS: Absolutely. That was my assumption.

THE COURT: So it would not have disposed of the entire case?

THE WITNESS: Absolutely not.

THE COURT: All right. Does anyone have any questions based on my questions?

MR. WINTERS: No, your Honor.

MR. WEBSTER: No, your Honor.

THE COURT: You can step down.

THE WITNESS: Your Honor, with the Court's indulgence, I am on trial.

THE COURT: You can leave. That is fine.

THE WITNESS: Thank you.

THE COURT: Before you do, though -

THE WITNESS: Yes, your Honor.

THE COURT: If anybody had asked me how one disposes of class allegations in this situation, what I would have told you is the way that it is commonly done here is that the plaintiffs agree to withdraw the class allegations, and then they settle what remains, which are the individual claims.

There is a problem with dismissing with prejudice the claims of nonparties who are not given notice. It quite clearly would not have any binding effect on that, but there is a way of doing it. It is done all the time, a couple of times a month in my courtroom, just in case anybody was wondering what I would have said if you had asked me.

THE WITNESS: Thank you, your Honor.

THE COURT: Call your next witness.

THE WITNESS: Should I leave the exhibits here?

THE COURT: Yes.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MR. WINTERS: Your Honor, I call John Daniels.

(Witness sworn.)

(Brief interruption.)

THE COURT: I think Mr. Daniels has been sworn, but he hadn't given his name yet.

JOHN D. DANIELS, PLAINTIFFS' WITNESS, DULY SWORN

DIRECT EXAMINATION

BY MR. WINTERS:

Q. Please state your name for the record and spell your last name.

A. John D. Daniels, D-a-n-i-e-l-s.

Q. May I call you Jack?

A. You may.

Q. Jack, were you aware that there was a telephone conference, status conference, with all parties and the Judge on June 26th of 2003?

A. I was.

Q. Did I, as the attorney for plaintiffs, report to you the results of that telephone conference?

A. You did.

Q. What did I report to you?

A. That it had been requested by the Judge that we conduct a settlement meeting or conference with Mr. Webster and his clients.

Q. The following day, June 27th, turning your attention to what I have marked as Exhibit A, did we -- our office receive the fax dated June 27th, 2003, from Freeborn & Peters?

MR. WEBSTER: Judge, leading.

THE COURT: It is leading. Let's get through it because time is finite.

THE WITNESS: I don't have one marked Exhibit A.

THE COURT: It is the letter dated the 27th of June.

BY MR. WINTERS:

Q. I will just hand it to you for your own reference.

Did you participate in a private settlement conference that was held at Sanchez & Daniels on July 1st, 2003?

A. Yes, I did.

Q. Who else was present?

A. Manny, Tim Hoffman, myself, yourself, Mr. Webster, Mr. Robinson, and Mr. Trudeau.

Q. Did you make a statement at the beginning of the conference regarding class issues?

A. I did.

Q. What did you state?

A. My recollection is that Manny made a statement initially, Mr. Trudeau made a statement, and then I made a

statement. And in my statement, among other things, I asserted that we were here strictly to talk about the claims of the Sanchez & Daniels participants in the plan, and we were not here to discuss attempting to settle or otherwise dispose of the class action, and that was the essence of it.

Q. Did I make a statement to that effect as well?

A. You did.

Q. Did Mr. Trudeau, Mr. Robinson, or Mr. Webster make any statement conditioning settlement discussions upon dismissal of the purported class?

A. No.

Q. Were you present when Mr. Robinson and Mr. Daniels excused themselves to have their private meeting?

A. Mr.. Sanchez.

Q. I am sorry.

Mr. Sanchez and Mr. Robinson had their private meeting?

A. Yes.

Q. Did they have a meeting with Manny Sanchez following the private conference?

A. I did.

Q. At that time did Mr. Sanchez tell you that there was an offer?

A. He did.

Q. Did he tell you the dollar amount of the offer?

A. He did.

Q. Did you agree to accept that offer?

A. I did.

Q. On behalf of yourself?

A. Ultimately, yes. There were two meetings.

Q. And did you agree to execute a mutual and general-release with respect to all defendants in exchange for the payment of the $583, 130.53?

A. I did.

Q. At any time prior -- strike that.

Were you present when Manny agreed to the deal with Jackie Robinson?

A. I think I was in the conference room while they were in Manny's office. I might have been in my office. I can't remember.

Q. At any time prior to the handshake between Manny and Jackie Robinson from Benistar. had anybody provided you any – made any oral statement or provided you any written document conditioning the dismissal or conditioning the settlement offers upon dismissal of the class in either Pennsylvania or Illinois?

A. No.

Q. Did you ever agree to dismiss the class with prejudice and without notice in. Pennsylvania and Illinois?

A. No.

MR. WINTERS: That is all I have. Thank you.

THE COURT: Mr. Webster.

CROSS EXAMINATION

BY MR. WEBSTER:

Q. Good afternoon, Mr. Daniels.

A. Charlie.

THE COURT: While you are getting ready there, do you have the exhibits that you have put in here?

MR. WINTERS: Yes, your Honor. They are in front of the witness.

THE COURT: Do you have a copy? I just want to have -

MR. WEBSTER: I don't think you gave him a copy of the June 27 letter.

THE COURT: That is the one I am looking for. The other, the "Agreement in Principle" I have got. It is an exhibit.

MR. WINTERS: If I may, there should be two copies here now.

THE WITNESS: Here is one, your Honor.

THE COURT: Thank you.

BY MR. WEBSTER:

Q. With whom did you discuss a general release?

A. Excuse me?

Q. I believe you mentioned to Mark, Mr. Winters, that you had had a conversation with someone with respect to a general release?

A. I don't remember whether it was Mark. I know that there was some talk of a release because obviously your people needed a release.

Q. Did you express this with either Mr. Robinson or Mr. Trudeau?

A. No.

Q. Or me?

A. Not that I recall.

Q. After the handshake, was there a discussion with respect to class issues in the room, in the meeting room?

A. I would not call it an argument, but yes.

Q. Who was the argument between?

A. I am not sure where it started because I had left the conference room shortly after you produced the draft memorandum, and I had not looked at it, and I had gone down to my office, and Mark came down to get me to tell me what the problem was with the memorandum, at which point I came back to the conference room, and I don't know what happened in there before I got there.

Q. Did you express to Manny that if you agreed to that meeting, the Agreement in Principle, that you, Manny, don't have a deal?

A. I think I specifically said so with respect to the agreement to dismiss, or the purported agreement to dismiss the class action with prejudice.

Q. And the same with respect to without notice to the proposed class?

A. Yes.

Q. Did you also express to Mr. Winters and Mr. Hoffman that, if they agreed to that, that there would be a problem with you?

A. I did.

Q. What did you understand Mr. Robinson and Mr. Trudeau and the administrative defendants to have agreed to with respect to the class issues?

A. I did not understand that they had addressed the class issues at all.

Q. Well, what was your understanding as to what would happen to the class issues?

A. My understanding was that any agreement that we individually might make was subject to the Court's approval under Rule 23, and that determination had to be made by the Court as to whether or not there would be any prejudicial impact on the class.

Q. Did you understand that you had filed an action on behalf of a proposed class?

A. Yes.

Q. Was it clear from the discussion with respect to the class issues that the administrative defendants had not reached an agreement with the Sanchez & Daniels plaintiffs with respect to the class issues?

A. It hadn't been discussed at all until you produced the memorandum.

Q. Well, did the administrative defendants express a concern about settling with the Sanchez and Daniels plaintiffs but then having a class action continue?

A. After the debate began, when the memorandum was produced, yes.

Q. Was there a discussion about whether or not Mr. Koresko had lined up additional plaintiffs other than the Sanchez & Daniels plaintiffs?

A. There was.

Q. That was that discussion?

A. I don't remember how it began, but I recall saying to you that it was my understanding that he either did have a substitute plaintiff, or could get one, and your responding that that was not true~

Q. Was there a response either from me or from Mr. Robinson or Mr. Trudeau about a class action going forward?

A I am sorry. I don't understand.

Q. Well, what was your understanding with respect to what the administrative defendants were saying about settling a class action?

A. At what point in time?

Q In this discussion with respect to the class issues.

A. The one that developed after the memorandum, you were saying and Mr. Robinson was saying -- I don't remember what Mr. Trudeau said about it -- you were saying that you could not possibly settle with us individually without disposing of the entire class, and I was disputing that assertion.

Q. Isn't it true then that there was disagreement with respect to the resolution of the class issues?

A At that point, absolutely.

Q. Was there ever agreement with respect to the class issues?

A. There was never a discussion of the class issues until you pulled out that memorandum.

Q. I understand your answer, but my question was a little different.

A. At that point, absolutely.

Q. Was there ever any agreement with respect to the class issues?

A. Well, in my opinion, yes, but it is a legal opinion.

Q. Did the administrative defendants or representatives ever express agreement with respect to the class issues with you?

A. Not in so many words. They did hear my statement at the onset and did not object to it.

Q. Isn't it true that they said that they were there to dispose of the entire case, both the Pennsylvania and Illinois?

A. At the later stage, yes, that is what they said.

Q. Didn't they say that in the beginning as well?

A. No.

Q. There was an agreement just to move on?

A. Excuse me?

Q. There was an agreement just to move the discussion on?

A. You are saying at the outset?

Q. Yes.

A. No, no.

Q. Isn't it fair to say that there was essentially a three-hour negotiating with respect to financial terms?

A. Yes.

Q. And what did those revolve around?

A. It began with, I think, Mr. Robinson, although it could have been you, saying that you wanted an indemnification agreement from us as to the nonadministrative defendants and any possible claims they might bring against you, or your clients, I should say.

Q. I understand.

And was there a discussion with respect to the administrative defendants indemnifying the Sanchez & Daniels participants as against claims that may be brought by their lawyers, Anderson, Kill and Mr. Koresko?

A. I don't think so. There was an additional discussion about indemnification. It did have to do with Mr. Koresko and Anderson, Kill, and frankly, I don't remember that exact terms of it.

Q. Was there any agreement with respect to the indemnification on those issues?

A. No.

Q. Is it fair to say that those issues at the end of the meeting, the very end of the meeting, were still open?

A. Well, in terms of the argument, yes. In terms of being part of the settlement, that is legal conclusions as well.

MR. WEBSTER: Your Honor, I don't have any further questions at this time.

THE COURT: Mr. Winters, do you?

MR. WINTERS: Briefly

REDIRECT EXAMINATION

BY MR. WINTERS:

Q. Jack, on the -

With respect to what the Benistar administrative defendants are expecting in return for the monetary settlement, is it true that even in the last few days they have been making offers to the individual Sanchez & Daniels participants?

MR. WEBSTER: Your Honor -

THE COURT: The objection is sustained. It is so far removed at this point after the motion has been filed, I don't think it could possibly be relevant.

MR. WINTERS: Then I have no questions.

THE COURT: Anything else, Mr. Webster?

MR. WEBSTER: No, your Honor, I do not.

THE COURT: Then you are excused.

(Witness excused.)

THE COURT: Call your next witness.

MR. WINTERS: I call Tim Hoffman.

(Witness sworn.)

TIMOTHY V. HOFFMAN, PLAINTIFFS' WITNESS, DULY SWORN

DIRECT EXAMINATION

BY MR. WINTERS:

Q. Would you please state your name for the record and spell your last name?

A. Timothy V. Hoffman, H-o-double-f-m-a-n.

Q. Were you present at the private settlement conference that was held at Sanchez & Daniels on July 1st, 2003?

A. Yes, I was.

Q. Were you present for the entire meeting?

A. Yes, I was.

Q. Were you present when the meeting began?

A. Yes, I was.

Q. At any time or -- strike that.

Were you present when Manny Sanchez shook hands with Jackie Robinson after returning from the small conference room?

A. Yes, I was.

Q. At any time prior to the handshake, did Charles Webster's, attorney for the administrative defendants condition the settlement offers upon dismissal of the class in Pennsylvania' or in Illinois?

A. There was no mention of anything about a class action before the handshake between Mr. Robinson and Mr. Sanchez.

Q. Well, did Mr. Daniels make any comment regarding the class action prior to the handshake?

A. Are you talking about the initial?

Q. That is correct.

A. Statements were made by, that I recall, you and Jack relative to us just negotiating for the individual defendants.

Q. As best as you can recall, what were the statements with respect to the handling of the class?

A. It was basically we are here for ourselves and we are not here to discuss the class. That is how I understood it.

Q. At any time prior to having seen what has now been marked as Exhibit C, the Agreement in Principle, had any of the administrative defendants' representatives, Mr. Trudeau or Mr. Robinson or their attorney, Mr. Webster, placed any conditions upon the individual acceptances of monetary amounts contained in their offers?

A. No.

Q. This concept that at some point Mr. Webster stated that the class would have to be dismissed and we agreed to move on, do you have any recollection of that happening?

A. I do after the handshake was done between Mr. Sanchez and Mr. Robinson, and I thought the deal was done.

Q. Any time prior to the handshake, did anybody state that the class would have to be dealt with with respect to the settlement offers?

A. Most definitely not.

MR. WINTERS: That is all I have. Thank you.

THE COURT: Mr. Webster.

CROSS EXAMINATION

BY MR. WEBSTER:

Q. May I call you Tim?

A. Absolutely.

Q. Tim, what was your understanding with respect to whether or not the administrative defendants had reached an agreement with you guys on the class issues?

A. It was a long meeting, and I almost hate to admit this. The entire time I was really focused on, selfishly perhaps, myself, how much I was going to get out of this, how much I had put into it.

The whole discussion was really as to, you know, what we had put into it versus what the administrative defendants had

gotten out of it, and there was a lot of arguments as to why should the administrative defendants pay you what you put into it when we didn't get all this money, et cetera, et cetera.

So, quite honestly; Charlie, I didn't think once during that three and a half hours about any class action ramifications. Maybe as a lawyer I should have been, but I didn't.

Q. Is it fair to say that at the end of what was an all afternoon affair, there was no agreement on the class issues?

A. It would be fair to say that because during the whole afternoon meeting, we didn't discuss the class. We just discussed the money that we had put in as individuals.

Q. Well, I understand that there was considerable discussion with respect to the financial numbers as they related to the Sanchez & Daniels participants?

A. Yes.

Q. And it is also true that there was considerable discussion with respect to the coverage provided by the step plan, true?

A. Yes.

Q. And that payments had been made to several participants, a Miss Yokanaba and a -

A. Mr. Varney.

Q. - -- and Mr. Varney?

A. Things like premiums and commissions, things of that nature.

Q. Commissions, tax issues and limitations issues, and there was -

The discussion literally went on these numbers for hours?

A. Yes.

Q. And after the private meeting between Mr. Robinson and Mr. Sanchez, isn't it true that the discussion continued after the handshake without a break with respect to all of this class business, the class action issues?

A. The class action discussions started after you took out the memorandum, and then the discussion ensued once we started looking at it, and I believe Mark Winters was the first one that brought up that, you know, hey, we have -- we weren't here for the class.

Q. Was there also discussion with respect to the indemnification issues?

A. Charlie, the only thing I can remember about the indemnification issues was that you guys said, absolutely not, we are not going to make any agreement as to Mr. Koresko or Anderson, Kill. They are not going to be parties to the release.

Honestly, that is the only thing I can remember about the indemnification discussions.

Q. The context there was that the administrative defendants refused to indemnify the Sanchez & Daniels participants on that score?

A. I don't know about that, but what I got out of it was there was a blood feud between John Koresko, Anderson, Kill and the administrative defendants, and the blood feud would continue.

Q. In the waning moments of this long meeting, was there an agreement to take the disagreement over the class issues to the Judge on a private basis?

A. That was your idea: Let's go to the Judge, let's talk to the Judge about it.

Q. And did you agree?

A. I thought it was reasonable, sure.

Q. Isn't that how the meeting was ended?

A. I don't know if the meeting ended, Charlie, with that statement or not.

Q. Did it ever end?

A. It did. I just don't remember the exact point that it ended with.

MR. WEBSTER: No further questions, your Honor.

THE COURT: Thank you.

MR. WINTERS: No questions.

THE COURT: You are excused.

(Witness excused.)

THE COURT: I have a couple of other questions I need to ask Mr. Daniels. Would you mind coming back up here?

(Brief interruption.)

JOHN D. DANIELS, COURT'S WITNESS, PREVIOUSLY SWORN

EXAMINATION

THE COURT: You understand you are still under oath?

THE WITNESS: Yes, . I do.

THE COURT: One of the letters -- I don't think it was shown to you, but one of the letters that was offered by Mr. Webster -- I might give it to you -- is marked as Defendants' Exhibit 1. This was a letter from Mr. Winters to the attorneys for the various defendants on June the 6th. Is it up there?

THE WITNESS: I have a copy, Judge.

THE COURT: Did you okay that or at least look at it before it went out?

THE WITNESS: I know I looked at it.

THE COURT: Really my question is this. If you see in the first paragraph of the first page there, I guess it is about three sentences in, the proposal, the settlement proposal, that is made in this letter is made basically on behalf

of the class, the putative class, if you will, and not just on behalf of Sanchez & Daniels. Do you see that there?

THE WITNESS: Judge, did you say in the first paragraph?

THE COURT: Are you looking at the same thing as me?

THE WITNESS: I hope so.

THE COURT: "Additionally to those defendants who issued," do you see that there?

THE WITNESS: I do.

THE COURT: Okay. Then when you went - So that is on June the 6th. Then you went to this meeting on the 1st of July, and you have testified that at the beginning of the meeting that you and Mr. Winters both made a statement to the effect that you were there to negotiate, not on behalf of the class, but just on behalf of the members of your law firm.

THE WITNESS: That is correct, Judge.

THE COURT: What changed between June the 6th and July the 1st?

THE WITNESS: Basically what changed was the objection to Mr. Koresko's admission pro hac vice for this case in this Court. At that point my recollection is that the defendants' objection was still pending before your Honor to his admission.

Mark, who, of course, is a member of my firm, felt conflicted, I think is the right term, in attempting to represent the class interests as well as the Sanchez & Daniels individual interests at the same time when, in point of fact, Mr. Koresko was really the attorney representing the class. And, accordingly, we did not make an effort to try to deal with the negotiation of the class issues.

THE COURT: Hang on just one second.

(Brief interruption.)

THE COURT: That is all I have. Does anyone have questions based on that?

Mr. Webster.

BY MR. WEBSTER:

Q. Mr. Daniels, briefly, did the administrative defendants' objections to the pro hac application by Mr. Koresko stop the plaintiffs, the Sanchez & Daniels plaintiffs, from making a demand on June 6th on behalf of the entire proposed class?

A. No.

MR. WEBSTER: That is all, your Honor.

THE COURT: Okay. Anything else?

MR. WINTERS: No questions.

THE COURT: You are excused.

(witness excused.)

THE COURT: Do you have any other witnesses?

MR. WINTERS: No, your Honor.

THE COURT: Mr. Webster, please call your first witness.

(Witness sworn.)

JACK ROBINSON, DEFENDANTS' WITNESS, DULY SWORN

DIRECT EXAMINATION

BY MR. WEBSTER:

Q. What is your name?

A. Jack Robinson.

Q. Are you employed?

A. Yes.

Q. Where?

THE COURT: Slow down, okay.. Go ahead.

BY THE WITNESS:

A. Benistar.

THE COURT: B-e-n-i-s-t-a-r.

BY MR. WEBSTER:

Q. What is Benistar's address?

A. 2187 Atlantic Street, Stamford| Connecticut.

Q. Are you a Connecticut resident?

A. Yes.

Q. In what capacity are you employed at Benistar?

A. I am in-house counsel.

Q. Pardon me. Are you in-house -- strike that. Mr. Robinson, were you present at the July 1 settlement conference at the offices of Sanchez & Daniels here in Chicago?

A. Yes.

Q. Were you here in Court during the testimony of Manny Sanchez?

A. Yes.

Q. Were you here during the testimony of Mr. Daniels and Mr. Hoffman?

A. Yes.

Q. Did you hear the questions and hear the answers?

A. Yes.

Q. With respect to Mr. Sanchez, do you have any disagreement with the answers that he gave?

A. I basically agree with everything Manny said generally except for two things.

Q. What might those be?

A. What happened at the very beginning of the meeting and what happened after the handshake.

Q. What happened at the beginning of the meeting?

A. At the beginning of the meeting, Manny was correct, that both Mark Winters and John Daniels made statements about they are only here to settle the Sanchez & Daniels plaintiffs.

And immediately when they said that, you said, well, no, we are hereto settle on behalf of the entire class. And I remember Don Trudëau also saying, yes, the only reason we flew out here was to settle the class action.

Then there was some banter back and forth, I believe, primarily between you and John Daniels as to whether it was the class or just S & D, and this all happened within two or three minutes, I believe.

And then you said, well, let's just move on and see if we can reach some other issues and we can come back to it.

Q. What happened next?

A. Then we launched into the entire discussion about money, and that took three-plus hours.

Q. After the discussion with respect to numbers, as I take it, did you have a meeting with Mr. Sanchez?

A. Yes, just as Manny testified.

Q. And did you reach an agreement of any kind?

A. Yes.

Q. What was it as to?

A. Well, we reached an agreement on a number in Manny's office, the $583,000.

Q. Was it –

Did you reach an agreement as to anything else?

A. No.

Q. Was there a discussion of what you, as an administrative defendant, would receive in return for that payment?

A. No.

Q. What was your understanding at that point as to whether the case was settled?

A. I believe the case was settled at that point because -

Q As to?

A.--as to the entire class because that is the only reason we flew out here.

There was no discussion between, myself and Manny and his office about class versus nonclass. It didn't come up.

Q. So at that point you thought the entire class would go away for that number?

A. Yes.

Q. In both Pennsylvania and in Illinois?

A. Yes.

Q. Following the meeting with Mr. Sanchez, was there a further -- were there further negotiations?

A. Yes.

Q. In this conference room?

A. Yes.

Q. How long did the further negotiation last?

A. About an hour after the handshake.

Q. What was it about?

A. It started off with the issue of class versus just S & D, and it continued on to indemnification and then went back to class versus nonclass and notice versus not having to give notice, and going back and forth for three or four tasks at the same time for about an hour.

Q. Did you express a position with respect to class issues?

A. Yes.

Q. What was it?

A. That the only reason we flew out here was to settle the entire case.

Q. And did you express anything about whether there would be a deal without a settlement as to the entire case?

A. No, it never entered my mind.

Q. Was there ever an agreement with respect to class issues?

A. No.

Q. Did you ever agree at any point that the negotiations would deal only with the Sanchez & Daniels participants and not the proposed class?

A. No.

Q. Subsequent to the handshake, was there also discussion with respect to indemnification issues?

A. Yes.

Q. Was there agreement?

A. No.

Q. In your mind -- strike that.

How long did this entire negotiation go from start to finish approximately?

A. As Manny said, I think we started at 1:00 and we ended around 5:00, a little after 5:00.

Q. When you left at the end of the day, were there any open issues as far as you were concerned?

A. Yes.

Q. What were they?

A. The notice to the -- whether we needed notice. It was agreed that you and Mark Winters would go to the Judge to

see if we needed notice and whether the classes settled or it was just S & D. John Daniels was claiming it was just S & D, and you were adamant that it was the class.

But Manny then said, well, you know, let's talk to the Judge, and maybe he can straighten it out for us. And then we agreed to do that, and there was no agreement on indemnification either.

Q. Was the class issue a deal-breaker in your mind?

A. Well, absolutely.

Q. Did you express it?

A. Yes. After the handshake, that is when it really came to a head.

Q. After this -

The negotiation took place on July 1st ?

A. Yes.

Q. And the 4th of July holiday was approaching?

A. Yes.

Q. Was there ever a meeting with the Judge?

A. Not to my knowledge.

Q. Subsequent to negotiations, did you withdraw or did you instruct your counsel to withdraw all offers?

A. Yes.

Q. Was that done?

A. Yes.

Q. In the form of the July 9th letter?

A. Yes, I believe so.

Q. Was there ever, that you saw, any letter in response to the July 9th letter?

A. No.

MR. WEBSTER: That is all at this time, your Honor.

THE COURT: Cross.

MR. WINTERS: Thank you, your Honor.

CROSS EXAMINATION

BY MR. WINTERS:

Q. Mr. Robinson, there are many Benistar entities, correct?

There's Benistar Services, Benistar Insurance, Benistar Inc. There's about 10 different Benistars, is that right?

MR. WEBSTER: Your Honor, I don't know if this is relevant.

THE COURT: Well, I don't either. So let's wait and see.

BY THE WITNESS:

A. There are several, yes.

BY MR. WINTERS:

Q. For which Benistar entity are you in-house counsel?

A. Benistar Admin Services.

THE COURT: The objection is overruled.

BY MR. WINTERS:

Q. Are you in-house counsel for any of the other Benistar entities?

A. Yes.

Q. Which ones?

A. Benistar 419 Plan Services.

THE COURT: Say it again.

THE WITNESS: Benistar 419 Plan Services, Step Plan Services, Inc. That is it.

BY MR. WINTERS:

Q. Now, Step Plan Services; Inc., is one of the defendants in this matter, correct?

A. Yes.

Q. As in-house counsel~ are you authorized by Benistar to make offers for settlement?

A. Yes.

Q. Were you authorized with respect to the dollar amount in this case, putting aside any other issues, $583,130.53?

A. I was authorized after the fact, yes.

Q. Were you present when Manny Sanchez did the calculation on his Palm recorder in his office and determined that that was the mid-point between the total Prudential payments and the payments to the nonsevered employees?

A. Yes.

Q. Did you agree with that amount when he came to it?

A. Yes.

Q. Now, your attorney in this matter, and by that I mean the attorney for Benistar in this matter, is Charles Webster correct?

A. Yes.

Q. As you said, you -

MR. WEBSTER: In Illinois.

BY MR. WINTERS:

Q. As I believe you said at the close of your testimony, you advised Mr. Webster, I guess some time prior to July 9, to withdraw offers, and he, in fact, did, correct?

A. Yes.

Q. So he acts at your direction, is that correct?

A. Yes.

Q. Turning your attention to what I marked as Plaintiffs' Exhibit A, the June 27, 2003 letter -

A. Yes, I have it.

Q.-- was Mr. Webster authorized to make that offer on behalf of Benistar and the administrative defendants?

A. Yes.

Q. You would agree that that offer does not contain a – is hot contingent upon dismissal of the class?

A. It doesn't discuss it, no.

Q. I believe you testified that there was a statement made that the only reason that you had flown out to Chicago was to settle for the entire class, is that your testimony?

A. Yes, it is, to make the entire case go away.

Q. You made an offer of $583,130.53 to the seven Sanchez & Daniels participants, is that correct?

A. Yes, to make the entire case go away.

Q. What did you offer to the other potential 253 employers?

A. Zero.

Q. And it was your understanding that Sanchez & Daniels was negotiating on behalf of the entire class and was

accepting $583,000 for themselves and zero for the class members?

A. Absolutely.

Q. With respect to dismissal of the Pennsylvania class, did you make any effort to contact Mr. Koresko, who was the attorney of record for the class in Pennsylvania?

A. I don't believe there is a class in Pennsylvania, or was.

Q. At this time in July of 2003, was Mr. Koresko the attorney for the class in Pennsylvania?

THE COURT: Why don't you say the putative class, and that will resolve the issue.

MR. WINTERS: Sure.

BY MR. WINTERS:

Q. Mr. Koresko, did you understand him to be the attorney for the putative class in Pennsylvania?

A. He was one of the attorneys.

MR. WEBSTER: Judge, I object to whether this has anything to do with -

THE COURT: No, the objection is overruled.

BY MR. WINTERS:

Q. The other attorney is Virginia Miller from Anderson, Kill, correct?

A. Yes.

Q. And was there any contact made with them regarding dismissal of the class actions in -- or the purported classes in Pennsylvania as part of this negotiation?

A. No.

Q. Was it your testimony at the very beginning -- I know I want to get this straight --'that you agree that I made a statement that we were negotiating only on behalf of the class, correct?

A. Correct.

Q. I am sorry.

You agree that the plaintiffs -- that I made the statement that the plaintiffs were negotiating solely on behalf of the seven Sanchez & Daniels participants, correct?

A. That is correct.

Q. You agree that Jack Daniels also made that statement?

A. I agree.

Q. And the point of disagreement is that you claim that Mr. Webster then contended that they were settling on behalf of, the entire class and that Mr. Trudeau then made some follow-up comment assenting to that, correct?

A. Correct.

THE COURT: Mr. Winters, have a seat. You don't have to stand up the whole time.

MR. WINTERS: That is all I have.

THE COURT: Further questions, Mr. Webster?

MR. WEBSTER: No, your Honor.

THE COURT: Hang on just one second here.

(Brief interruption)

THE COURT: Let me make sure I understand a couple of things, Mr. Robinson. I am summarizing this fairly drastically, but as I understand your overview, if you will, of the early stages of the meeting, at some point, as you have testified, Mr. Winters and Mr. Daniels both said that they were only there to settle or negotiate on behalf of the Sanchez & Daniels plaintiffs.

You indicated that Mr. Robinson responded, that is not correct, we are going to settle for the whole class.

THE WITNESS: Excuse me, your Honor; Mr. Webster.

THE COURT: Mr. Webster, my apologies. Mr. Trudeau essentially echoed that.

Then this is the part I want to ask you about. You indicated that there was some discussion back and forth for a bit, and then someone -- and I didn't catch who -- you said then suggested, why don't we talk about other things and then come back to it.

THE WITNESS: Yes, Mr. Webster.

THE COURT: did I get right essentially what Mr. Webster suggested, in other words, that you talk about --you table that issue for right now, talk about other issues and then come back to it?

THE WITNESS: Yes, your Honor.

THE COURT: Was anything said in response to that suggestion by Mr. Webster by any of the participants on the other side, if you will?

THE WITNESS: I think Manny said, yes, that is a good idea, let's go forward. That is my recollection. I believe it was Manny, yes.

THE COURT: Prior to the time that you and Mr. Sanchez went into the room separately to talk, had there been any further discussion about the question of whether it was a class settlement or an individual settlement, in other words, had you come back to the issue?

THE WITNESS: No, not at all.

THE COURT: When you were in the room with Mr. Sanchez, was there any discussion about that?

THE WITNESS: No, your Honor.

THE COURT: All right, are there further questions based on the question that I asked by either side?

MR. WINTERS: No, your Honor.

MR. WEBSTER: No, your Honor.

THE COURT: You are excused.

(Witness excused.)

THE COURT: Next witness, please (Witness sworn.)

THOMAS TRUDEAU, DEFENDANTS' WITNESS, DULY SWORN

DIRECT EXAMINATION

BY MR. WEBSTER:

Q. Would you please state your name?

A. Tom Trudeau.

THE REPORTER: Please spell your last name.

THE WITNESS: T-r-u-d-e-a-u.

BY MR. WEBSTER:

Q. Are you employed?

A. Yes.

Q Where?

A. Benistar Admin Services, Inc.

Q. In Connecticut?

A. 2187 Atlantic Street in Stamford, Connecticut, 06902.

Q. In what capacity are you employed by Benistar?

A. I am an officer of the company.

Q. And did you accompany Mr. Robinson for the settlement conference at the offices of Sanchez & Daniels here in Chicago on July 1st ?

A. Yes, I did.

Q. Were you present during Mr. Manny Sanchez and Mr. John Daniels and Mr. -- pardon me -- Tim Hoffman's testimony here today in Court?

A. Yes, I was.

Q. Did you hear their answers and did you hear the questions?

A. Yes, I did.

Q. Do you disagree with anything that was said by Mr. Sanchez?

A. In general~ for the most part I am in agreement with his statements.

There are a few areas that I would disagree with.

Q. With respect to the early stages of the meeting what did you say with respect to this issue of whether or not the negotiations were on behalf of a limited number of plaintiffs or the entire class?

A. My recollection is I didn't say much in that regard. I echoed some comments that you made that we were here to settle on behalf of -- to make settlement as it relates to all plaintiffs, to settle the case in its entirety.

Q. Was there ever any agreement by either you or Mr. Robinson that you heard, or me, for that matter, that the negotiation would deal only with Sanchez & Daniels and not the proposed class?

A. No, there wasn't, as others have testified.

Mr. Winters and Mr. Daniels, you know, raised those concerns along with a handful of other concerns at the onset of meeting; and I felt we were getting off -- we were getting off to a poor start, and I tried to get us focused on the core issues and trying to move forward in settling the matter in its entirety.

And after I made a brief statement in that regard, Mr. Sanchez echoed the same sentiment, that while they had these concerns, they, too, were there in hopes of settling the matter in its entirety.

So the contentious issues were kind of left to be dealt with in due course, I guess, and we hoped to make progress primarily on the economic issue, which at the time seemed like the largest issue.

Q. Was there considerable discussion on economic issues?

A. At least three hours' worth, yes.

Q. Was there a return to this earlier discussion on the scope of the negotiations?

A. Yes, not until much later in the discussions.

Q. When did it come up again, and who said what?

A. It come up again after Mr. Sanchez and Mr. Robinson has come to an agreement on the economic terms, and there was some small amount of discussion relative to a slight discrepancy in the exact number that they had agreed upon, and that was worked out.

And then we moved forward with trying to -- it was getting late in the day. We wanted to get something in writing as to, you know, what was agreed upon. And that is when you had presented our -- a draft of agreement that we had prepared.

And after review of that, many of those same contentious issues came up again including the class issue and a few other issues.

THE COURT: Hang on one second, Mr. Webster.
(Brief interruption.)

THE COURT: Go ahead.

BY MR. WEBSTER:

Q. Did you express anything with respect to whether or not the Benistar defendants would settle the case without resolving the class issues?

A. When that came up actually, I think I kind of wanted to get the thing moved along, and you audibly said, you can't make this -- you can't make this agreement unless it includes all class, and after thinking about it, I concurred with that sentiment.

Q. Did you express that concurrence?

A. Yes.

Q. What was your understanding as to whether there was an agreement on the class issues?

A. There wasn't an agreement reached on, as many of the others have testified, on the class issue. It was fairly contentious.

We tried to work through some of those issues. We spent, I don't know, 45 minutes or so trying to come to some agreement. I think there were different proposals. Maybe we could, you know, we could hold the economic side of it open until that issue was resolved in some way, and even that was contentious. So there were -

There was no agreement in any form.

MR. WEBSTER: I don't have anything else at this time, your Honor.

THE COURT: Mr. Winters.

MR. WINTERS: Thank you, your Honor.

CROSS EXAMINATION

BY MR. WINTERS:

Q. I want to make sure that your testimony today is clear. You are testifying that at the onset at the meeting, at the beginning of the meeting, that you echoed comments made by Mr. Webster requiring that the case be settled in its entirety; is that your testimony today?

A. Yes, and the context of it, I believe, is that you had raised some concerns as well as Mr. Daniels relative to who was being represented and how that settlement was to progress.

Q. So your testimony today -

A. -- and I supported that.

Q. Your testimony today is that I raised some concerns, John Daniels raised some concerns, and then Charles Webster made a comment, and you echoed that comment, correct?

A. Yes Both Mr. Sanchez and myself reaffirmed that we were here to settle this case in its entirety.

Q. I show you what I will have marked as Defendants' Exhibit -- strike that -- Plaintiffs' Exhibit D.

It is your affidavit attached to the response to the motion to compel settlement.

This is your signed declaration attached to the response brief, correct?

A. Yes.

Q. And is that your signature on the bottom of page 2?

A. Yes.

Q. According to the declaration, it was executed on August 4th, 2003, is that correct?

A. I believe so.

Q. And you reviewed the document before you signed it?

A. Yes.

Q. You knew it was going to be used as an exhibit with respect to this motion?

A. Yes.

Q. Turning your attention to paragraph 2, would you please read to the Court what is written and executed by you in paragraph 2?

A. At the beginning of the meeting, Mr. Daniels, Mr. Sanchez and I gave our respective views of the case and why we were there.

Mr. Daniels did not state that the discussions were to deal only with the Sanchez & Daniels participants as opposed to the putative class. In fact, there were no discussions of the class issues until the end of the meeting.

Q. It was your declaration that as of August 4th, there was no suggestion as to class issues until near the end of the meeting, correct?

A. That's correct.

Q. Now, with respect to this settlement, the dollar amount that has been -- that was mentioned by Mr. Robinson, do you have any disagreement with that dollar amount, $583,130.53?

A. I am not sure which dollar amount you are referring to. Is it on a document you are saying or -

Q. Do you have any reason -

Do you disagree with Mr. Robinson's testimony regarding the -- at least the monetary side of it, the dollar amount offer that was made to the seven Sanchez & Daniels participants?

A. I don't disagree with it; I agree with it.

Q. What monetary or other compensation or return was being offered to the remaining potential class members?

A. I don't believe there was any specific offered to any other -- any other plaintiffs that I am aware of.

MR. WINTERS: That is all I have. Thank you.

THE COURT: Mr. Webster.

MR. WEBSTER: Nothing, your Honor.

THE COURT: You are excused.

(Witness excused.)

THE COURT: Any other witnesses?

MR. WEBSTER: No, your Honor.

THE COURT: Let's take 10 minutes and then I will hear -- let's take five minutes, and then I will hear, you know, somewhere around 110 or so minutes in argument from each side.

(Brief recess.)

THE COURT: All right, everybody have a seat.

Okay, it is your motion, Mr. Winters. Why don't you go ahead.

MR. WINTERS: Thank you, your Honor.

Your Honor, with respect to the testimony that has been provided today, I believe that the Sanchez & Daniels participants who were present at the meeting and who testified have been very consistent. They testified that, at the onset of the meeting, John Daniels and I both stated that the settlement was with respect to solely the seven Sanchez & Daniels participants.

After several hours of negotiations on the dollar amount, there is no dispute that an offer was made, the offer is authorized, and the dollar amount of that offer is $583,130.53.

There is no dispute that after returning from the – a small conference room at Sanchez & Daniels to our main conference room, a handshake was exchanged, and the phrase, "we have a deal" was exchanged. The Sanchez & Daniels participants have testified that they have been consistent in all of these matters.

With respect to the testimony from the administrative defendants, and the most specifically the Benistar representative, they have essentially agreed in large part to much of the testimony. However, the disagreement comes when they talk about the onset of the meeting. Mr. Robinson testified today that, at the onset of the meeting, Charles Webster, the Illinois

attorney for Benistar, made the statement that this could only be settled on behalf of the class. Then according to Mr. Robinson's testimony, Mr. Trudeau echoed that comment.

However, attached as Exhibit B to the response to our motion to enforce the settlement, Jackie Robinson, in paragraph executed the following statement:

"We met for almost four hours and discussed many issues. There were no discussions of the class action issues Until near the end of the meeting. "

Mr. Trudeau in his affidavit flat-out denied that Mr. Daniels had made any comment limiting the discussions to the seven Sanchez & Daniels participants despite the fact that on the stand today he agreed that Mr. Daniels made those comments.

Further, Mr. Trudeau's affidavit states that, in fact, there were no discussions of the class issues until the near -- until near the end of the meeting.

Finally, with respect to this concept that the only reason we flew in to Chicago was to settle the entire matter on behalf of the class, I would remind the Court that we had that telephone conference on June 26th. All parties were present. I believe there was up to 15 parties present.

And the following day, in response to the suggestion that we have a private mediation, we received a fax from Freeborn & Peters, authorized, according to Jackie Robinson, in-house counsel from Benistar, offering $393,940.14 with no contingency upon dismissal of the class.

So the concept or the idea that the only reason they flew in to Chicago was to dismiss the action on behalf of the class is contradicted by the fact that they had made an offer to the individual defendants not conditional upon the dismissal.

Then, when it comes down to it, I would echo what Manny Sanchez testified to regarding his visceral reaction to this Agreement in Principle. We never sought, but we knew that agreeing to dismiss the class action with prejudice and without notice just didn't smell right, and there was no way that we were negotiating under those conditions from the beginning.

Both John Daniels and I stated we weren't negotiating on behalf of the class. We spent several hours negotiating numbers, numbers solely related to the seven participants. And to believe the administrative defendants, to believe Benistar, you would have to believe that Sanchez & Daniels agreed to dismiss the entire class for $583,000 in its own pocket and zero, nothing, to the remaining class members. We made it clear that we would not prejudice the class members, that we would take no action detrimental to the class, and that we were negotiating only on behalf of the seven participants, and that testimony I think has been consistent today.

Thank you.

THE COURT: Hang on a second.

Your contention, as I understand it, is basically that there was an understanding at the outset following these comments that were made that what was going on was a negotiation on

behalf of the individual plaintiffs in the law firm, not the class.

MR. WINTERS: The seven names and Sanchez, yes, Judge.

THE COURT: I don't believe there was any testimony from either Mr. Sanchez and Mr. Daniels and Mr. Hoffman that anyone on the other side of the room agreed to or assented to or expressed a common understanding after you and Mr. Sanchez made these comments that we are here to settle -- we are here to discuss our case, not the class case.

In other words, the testimony from the plaintiffs was that the other side basically said nothing. And my question to you is: Is that significant? In other words, does there have to have been some sort of overt expression of agreement or meeting of the minds as to what was being negotiated, or could the defendants -- is it a viable theory for the defendants to say, we heard him say that, we didn't say anything, we didn't agree to it, and, you know, we discussed these other issues, and then when we got to the class issue, we just could not reach an agreement?

Is that a viable theory? And if you don't think so, tell me why.

MR. WINTERS: I don't think so. I believe that by - even if you were to accept that the defendants neither accepted nor rejected the comments made by John Daniels and myself, I believe that their actions -- speaking through the documents and the negotiations, which are specific to dollar

amounts to these seven people -- imply a consent. And if they had -

THE COURT: In other words, it doesn't have to be express consent as to the basis or as to what is being negotiated; it can be implicit in the people, in the participants' actions and their words, and you are saying that, in this case, it was essentially implicit.

MR. WINTERS: I believe it was implicit. Our starting point was a written offer that did not require dismissal of the class. We made our initial comments. And then all of this financial discussion dealt with John Daniels put in this much Tim Hoffman put in this much.

So I believe it was an implicit assent even if you accept the fact that they did not respond I but keep in mind that they have testified today that they weren't silent.

THE COURT: No, I understand that they disagree. I understand that.

All right, thank you. Mr. Webster.

MR. WEBSTER:

Your Honor?

THE COURT: I am ready. Go ahead.

MR. WEBSTER: Thank you, your Honor.

In our view, this situation when you step back, presents a rather clear picture. These parties have met for the better part of a day, certainly an entire afternoon, to discuss settlement.

Statements were made I views were exchanged, hours were spent coming to terms on the financial issues. It is undeniably a class action. There was undeniably considerable discussion with respect to the class issues as understood by these parties. Without a break on the negotiations, those discussions took place and there was undeniably no agreement as to the class issues which would certainly –

There certainly was no meeting of the minds. And in our view, the agreement, assent on those issues, is material to the deal.

THE COURT: Is your theory as to what happened here that the plaintiff said, we want to negotiate only for the individuals, not the class, and that the defendants' representatives said, no, we won't do that; or is your theory that the plaintiffs said those things, in other words, we want to negotiate on behalf of the individuals and that the defendants said nothing; or is your theory that the plaintiffs' representatives said nothing about that, because there are three theories that emerge from the evidence here potentially?

MR. WEBSTER: I understand.

THE COURT: And I want to know which one is your theory.

MR. WEBSTER: Our theory is that they made statements, we made statements. The discussion moved off of it. They may be quibbling over words on the declarations.

THE COURT: In other words, essentially what you are saying is that your theory is consistent with what Mr.

Robinson and Mr. Trudeau testified to here on the witness stand?

MR. WEBSTER: Yes, that there were statements that were made, and then the discussion moved on. There wasn't a discussion -

THE COURT: So how do you deal then with the, you know, what is said in the affidavits? And let's forget for the time being Mr. Robinson's affidavit. Let's talk about Mr. Trudeau's affidavit.

Mr. Daniels did not state that the discussions were to deal only with the Sanchez & Daniels participants as opposed to the putative class.

Had Mr. Daniels made such an opening remark, the settlement conference would have ended immediately.

How do you deal with that?

MR. WEBSTER.: I think that the key words in that were that there were no discussions of the class issues until near the end of the meeting. I think that in the declaration what he is thinking of -

THE COURT: You basically want me to kind of squint my eyes when I am looking at that sentence that I just read and just read the next sentence.

MR. WEBSTER: Well, I don't think that you recalled hearing -- did not state that the discussions were to deal with the Sanchez & Daniels participants as opposed to the putative class. I think he didn't recall that at the time he made his

declaration and that there were no discussions of class issues until the end of the meeting.

THE COURT: Okay, go ahead. I don't want to get you offtrack.

MR. WEBSTER: -- statements as opposed to discussions.

When you negotiate anything, there are a lot of statements made, and there's a lot of discussions, and there are threads of conversation that are picked up, and there are threads that are dropped. The question is whether or not there is a meeting of the minds on material terms.

And there is more to a class action discussion than simply what a particular plaintiff is going to get. And, in fact, these negotiations carried on after the financials as to them were agreed to, for roughly an hour, and it is clear that there was absolutely no agreement with respect to any of those issues. Those issues were still open; otherwise why even would there have been a discussion of, well, let's go to the Judge on an informal basis to try to resolve it?

And it is also clear, I think, from the testimony we have heard today that the plaintiffs were aware of the class issues. We heard Mr. Hoffman talk about a blood feud between these defendants and what was going on in Pennsylvania. I think the dynamics were clear. And so they knew and understood that there was -- this issue of resolution of these class issues and what would happen to the class were important to these defendants in exchange for this payment.

THE COURT: Let me go back to something you said because I want to make sure I understood it.

Basically what you are saying is that, hey, wait a second, if the class -- if the question of whether it was a class versus an individual discussion had been determined at the beginning, in other words, hadn't been set aside, there would have been no reason for anyone to suggest later, hey, let's see if we can get the Judge to work this out. In other words, at that point the plaintiffs would have said, hey, we have got a deal, goodbye, we are done.

MR. WEBSTER: Precisely.

THE COURT: I get that point. Think about that, Mr. Winters, because I am going to ask you what you have to say about that.

MR. WEBSTER: And there would not have been a discussion for an hour after Mr. Sanchez and Mr. Robinson came to an agreement with respect to, the financial terms. There would not have been a discussion about the class issues for an hour if there were an agreement.

And there has been a lot of discussion about who they were truly negotiating upon, when you step back that surrounds that June 27th letter. Well, the June 27th letter is in response to their June 6th letter, which plainly states that they were making a demand on behalf of the entire class.

So I think when placed in context, that June 27th, '03 letter is only talking about the financials as would relate to them. And, in any event, their testimony, the plaintiffs' tes-

timony, the testimony I believe -- I know from Mr. Manny Sanchez and I believe Mr. Daniels as well -- is that this - the offer expressed in this June 27th letter was rejected. So it doesn't really add much at the end of the day to the discussion.

These parties negotiated. They came to an agreement regarding the amount that the defendants would pay and that the plaintiffs, the individual plaintiffs here, would receive, but they never reached any agreement as to what was being released in return for that payment. They never reached any agreement as to what was coming. They were focused, plainly focused, on what was coming from-the defendants' side to them, but there was no agreement as to what was coming from them to the defendants, and there was considerable discussion, and there was no resolution.

Your Honor, that is this issue. That is this case.

THE COURT: Mr. Winters, have you thought about the question that I asked?

MR. WINTERS: Yes, your Honor.

Actually, as Manny Sanchez testified to, there was a period of about five minutes or so where people were just shaking hands and saying, hey, we worked quite a long time and we came to a resolution, and it wasn't until after that point that Mr. Webster pulled out this Agreement in Principle.

When the Agreement in Principle was pulled out, I don't believe that Manny Sanchez understood the import of it. He thought that it was going to simply memorialize the dollar

term. I think that was Tim Hoffman's understanding as well, and John Daniels wasn't even in the conference room any longer. I had to go get him.

The discussions continued. I read the document and I at that point-

THE COURT: Don't testify here now, Mr. Winters. Just talk to me about what was put in evidence at the hearing we just had.

MR. WINTERS: It took me about a half hour to get Jack in and convince Manny that what they are trying do here is make us dismiss the class with prejudice and without notice as part of the dollar amount coming in return.

THE COURT: Basically what you are telling me is Mr. Sanchez was just trying to be helpful, but he really was not completely understanding or focused on what the real issue or problem was.

MR. WINTERS: I don't think that he understood that paragraph one of the Agreement in Principle required that the Sanchez & Daniels participants would not get their money until the class in Illinois and Pennsylvania was dismissed with prejudice-and, without notice.

And it took actually -- it took me a couple of minutes to get that message across. So if the question is, hey, why didn't you say goodbye, we have a deal, it took quite a time -- it took quite a bit of time to clarify it.

Now, I would agree with John Daniels' testimony at the evidence hearing that this was not a continuing discussion

about the terms. At that point it turned into an argument with Mr. Webster telling us, this is the way it is always done, and, quite frankly, in very forceful terms, John Daniels, as he testified to, stating that, show me some proof of that. I don't believe this is the way it is always done.

Now, we actually went on and on like that for quite some time. So in terms of why didn't we just say goodbye and leave, well, we certainly wanted this to end. That was the whole reason we were there. And it took awhile to get the message through that this is what they were requiring, and, quite frankly, an argument broke out afterwards.

THE COURT: Mr. Webster, I gave Mr. Winters a chance to say some more things. Do you want to say anything else?

MR. WEBSTER: I think the question is: Why would you have to go to the Judge for an informal to resolve unresolved sues if you had a deal?

THE COURT: Well, I need to do some thinking about this, and, frankly, I want to do a little bit of research on the question that I posed to Mr. Winters towards the end of his argument having to do with whether there needed to be some express assent as to the basis upon which negotiations were being conducted and whether tacit or implied assent is sufficient and, if the latter is sufficient, what it takes to show that.

And so what I am inclined to do -- this won't take me very long to do. I am going to set this for a -- I am set to hear argument -- I don't normally hold court on Fridays, but I am

set to hear argument on a motion in another case early Friday afternoon. So I would like you -- I am going to set it for -- I am going to set this matter for ruling on this Friday, the 10th, at 1:30 in the afternoon. The odds are it is going to be an oral ruling. It could be a written ruling, but one way or another, I will give it to you then, whether it is oral or in writing, okay.

MR. WEBSTER: Your Honor?

THE COURT: Don't ask to submit more memoranda.

MR. WEBSTER: No, I wasn't going to, your Honor.

THE COURT: Okay.

MR. WEBSTER: In point of order, is there any need to have the witnesses present?

THE COURT: No, absolutely not. I just need lawyers here.

MR. WEBSTER: You have heard from -

THE COURT: Everybody has rested, everybody has rested.

By the way, Plaintiffs' Exhibit A is admitted in evidence. I don't ,think you ever offered it, but that is the superior letter.

I don't need any witnesses here. It is just going to be a ruling, no argument, no nothing other than a ruling.

MR. WEBSTER: Thank you,. your Honor.

THE COURT: Okay, great. Thanks a lot.

(Which were all the proceedings had in the above entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Laura M. Brennan
Official Court Reporter
Northern District Illinois

Date

APPENDIX G – OBJECTION TO MOTION TO WITHDRAW, DATED JULY 22, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, *et al.*, Plaintiffs,	) Case No. 03-CV-1550)
v.	) Judge Matthew F. Kennelly
WAYNE BURSEY, *et al.* Defendants.	))

NOTICE OF FILING

TO: All Counsel of Record
(See attached Service List)

PLEASE TAKE NOTICE that on Friday, July 23, 2004, counsel for plaintiffs filed the attached **Plaintiffs' Objection to Withdrawal of Attorney John Koresko and Request for an *In Camera* Hearing**, a copy of which is attached.

Dated: July 22, 2004

Respectfully submitted

By _____
Attorney for Plaintiff

Clinton A. Krislov
Jason P. Stiehl
KRISLOV & ASSOCIATES, LTD
20 North Wacker Drive, Suite 1350
Chicago, Illinois 60601
Tel.: (312) 606-0500
Fax: (312) 606-0207
Firm ID No.: 91198
Attorneys for Plaintiff

John J. Koresko, V
Koresko & Associates
200 W. 4th St.
Bridgeport, PA 19405
(610) 992-2200

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, *et al.*,	)Case No. 03-CV-1550
Plaintiffs,	)
v.	)Judge Matthew F. Kennelly
WAYNE BURSEY, *et al*,	)
Defendants.	)

PLAINTIFFS' OBJECTION TO WITHDRAWAL OF ATTORNEY JOHN KORESKO, REQUEST FOR AN *IN CAMERA* HEARING

Responding to this court's July 9, 2004 minute order directing Plaintiffs, via their Chicago counsel, to advise the Court whether they object to the motion to withdraw:

Plaintiffs object to the withdrawal of Attorney Koresko. Plaintiffs respectfully assert that no conflict of interest exists between Plaintiffs and Attorney Koresko, and withdrawal would create a hardship to the plaintiffs' case.

Any potential conflict that existed has been waived and resolved. The remaining issues regarding the withdrawal implicate the attorney-client privilege, and are none of the

defendants' legitimate interest. Accordingly, in order to resolve the issues without reaching the privilege to the defendants' advantage, Plaintiffs request this Court allow the resolution- of this matter to be done *in camera.*

Dated: July 22, 2004

Respectfully submitted,

_____

Attorney for Plaintiffs

Clint A Krislov
Jason P. Stiehl
KRISLOV & ASSOCIATES, LTD.
Civic Opera House
20 N. Wacker Drive, Suite 1350
Chicago, Illinois 60606
(312) 606-0500
Attorneys for Plaintiffs

APPENDIX H – MOTION FOR LEAVE TO WITHDRAW AS COUNSEL , DATED JULY 5, 2004

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, et al.	
Plaintiff	: No. 03-CV-1550
v.	:
	: Judge Matthew Kennelly
WAYNE BURSEY, et al.	: Room 2106
Defendant	:
	:

MOTION OF JOHN J. KORESKO, V, ESQUIRE FOR LEAVE TO WITHDRAW AS COUNSEL FOR PLAINTIFF

JOHN J. KORESKO, V, ESQUIRE ("KORESKO"), admitted pro hac vice to serve as counsel to the plaintiff, hereby respectfully requests leave to withdraw from representation.

The reasons for withdrawal are set forth in the attached Memorandum.

The undersigned has given his clients due written notice of this intention to withdraw prior to submitting this request to the Court.

Respectfully submitted,

John J. Koresko, V, Esquire
200 W. 4th St.
Bridgeport, PA 19405
Tel: 610-992-2200
CO-COUNSEL FOR PLAINTIFF

Dated July 5, 2004

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, et al.		
Plaintiff	:	**No. 03-CV-1550**
v.	:	
	:	**Judge Matthew Kennelly**
WAYNE BURSEY, et al.	:	**Room 2106**
Defendant	:	
	:	

MEMORANDUM IN SUPPORT OF MOTION OF JOHN J. KORESKO, V, ESQUIRE FOR LEAVE TO WITHDRAW AS COUNSEL FOR PLAINTIFFS

JOHN J. KORESKO, V, ESQUIRE ("KORESKO"), a member of the Pennsylvania Bar, and admitted *pro hac vice* to serve as counsel to the plaintiff, hereby respectfully requests leave to withdraw from representation.

I. STANDARD FOR WITHDRAWAL

RULE 1.16 of the Rules of Professional Conduct governing Pennsylvania lawyers is incorporated also into Local Rules **LR** 83.51.16 of this court. Entitled " DECLINING OR TERMINATING REPRESENTATION," the Rule sets out the circumstances under which a lawyer must withdraw or

may seek leave to withdraw, and provides guidelines for the Court to permit said withdrawal. The Rule provides as follows:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

> (1) the representation will result in violation of the rules of professional conduct or other law;
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: . . .

> (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
>
> (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (6) other good cause for withdrawal exists.

II. COUNSEL HAS AN ACTUAL OR POTENTIAL CONFLICT OF INTEREST

In previous submissions to this Court, Counsel has advised that Counsel and the Plaintiffs have been sued in the Philadelphia Court of Common Pleas by the defendant in this matter. ***STEP Plan Services, Inc., Plaintiff v. John J. Koresko, V, Lawrence Koresko, Koresko and Associates, P.C.,Koresko Financial, L.P., Penn-Mont Benefit Services, Inc.,["Koresko Defendants"] Capitas Financial, LLC, ["Capitas"],Anderson, Kill & Olick, P.C., Virginia I. Miller, Esquire, Lawrence S. Fischer, Esquire [the AKO Defendants"], Community Trust Company, Lowell Gates, Esquire, ["CTC Defendants"] Arrow Drilling Co., Inc., Nestor Garza ["Arrow Defendants"],and Sanchez and Daniels, Manuel Sanchez and John Daniels ["Sanchez Defendants"]***, Civil Action No. 7718, March Term (hereinafter, "the Phila case"). On June 11, 2004, that case was removed by defendants therein to the United States District Court for the Eastern District of Pennsylvania. A copy of the Complaint is attached hereto as Exhibit A.

The Phila case seeks damages for tortious interference with business relationships, conspiracy, and defamation. STEP Services, Inc. ("SSI") specifically avers as to the Koresko Defendants that they engaged in a scheme to injure Plaintiff's business as a fiduciary and sponsor of Multiple Employer Welfare Benefit Plans under the Employment Retirement Income Security Act (ERISA) (29 U.S. §1001 et seq.) by "soliciting and conspiring with participants of the

STEP Plan [and other defendants] to bring unfounded lawsuits and obtain temporary restraining orders against the plaintiff Sponsor of the STEP Plan and its affiliates." The AKO defendants and Capitas are alleged to be co-conspirators with Koresko Defendants, along with the CTC, Arrow, and Sanchez Defendants. Of course, the only lawsuits brought against SSI are those that began in Philadelphia and refilled here. Arrow Defendants have no relationship at all to SSI, except now SSI alleges that BENISTAR is a "sister company" of SSI.[1] SSI alleges the same "competitor theory" that has been rejected previously as a basis for fees and other equitable relief. AKO Defendants represented the Sanchez Defendants, and currently represents the Arrow Defendants in a case on appeal to the Third Circuit against the Benistar 419 Plan and its Administrator and affiliates. Of course, John Koresko represents the Sanchez Defendants in the case at bar, and serves generally as counsel to the Arrow Defendants. Capitas, a limited liability co pany based in Minnesota, for whose members Koresko provides consulting services, has been drawn into the fray. CTC was simply the trustee that volunteered in the Philadelphia incarnation of

---

[1] The Court should take very particular note of this admission. Plaintiffs previously filed a Motion for Preliminary Injunction and alleged that SSI was an alter-ego of other Benistar entities who are liable on a judgment in excess of $25 million. SSI, a company formed in 2001, has never alleged it could satisfy the judgment. Plaintiffs alleged that SSI was, therefore, insolvent. Plaintiffs argued that insolvency satisfied the standard of "irreparable harm" articulated in several Seventh Circuit precedents. The Court may wish to reconsider its decision given this information.

this case to serve as successor fiduciary if SSI were removed. Koresko has never met Lawrence Fisher.

Remarkably, the Complaint alleges the legal conclusion that SSI is the "Sponsor" of the STEP Plan. This Court is well aware that the issue of SSI's right to be Sponsor is the ultimate legal issue in the litigation here.[2] The Defendants in the Phila action contest standing of SSI to pursue such claims until this Court rules that the turnover of the STEP trust from U.S. Trust to successor fiduciaries was done in accordance with law. That Complaint also sues the Sanchez Defendants for the same causes of action alleged as counterclaims here.

LR83.51.7 "Conflict of Interest: General Rule," provides as follows:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after disclosure.

---

[2] If US Trust did not validly resign as Sponsor and Trustee, and thereafter STEP, Inc. and others illegally seized control of the STEP trust, then the alleged transfer to STEP Services, Inc. was void. SSI would have no standing to sue and would have no claims here or in Philadelphia.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure.

The Comments to the Rule advise:

Loyalty is an essential element in the lawyer's relationship to a client. . . .The lawyer should adopt reasonable procedures . . . to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See* LR83.51.16. . . .

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent. Section (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous

representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Section (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Section (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interests involved. . . .

Lawyer's Interests. The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. . . . If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation. . . .

> Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. The propriety of concurrent representation can depend on the nature of the litigation

Regardless of the specious nature of the Phila complaint and its unmistakable connection to the litigation at Bar [including the transparent attempt to circumvent the Federal Rules relating to counterclaims and joinder, this Court's recent orders regarding attorney conduct addressed to SSI and other lawyers, and the prior orders of U.S. District Judge Davis in the Daniels and Arrow litigation], the potential for cross-claims against Counsel by the Sanchez Defendants (and vice versa) clearly exists. For example, the Sanchez Defendants might allege, on the advice of new counsel who will represent them in Philadelphia, that Counsel committed malpractice or some other tort that sucked them into the Phila action. It is probable Counsel may have a trial strategy in the Phila action that conflicts with that of the Sanchez Defendants.

Another conflict involves representation. Counsel has already entered an appearance for himself and the other Koresko Defendants. Counsel has a relationship with the Arrow Defendants. Counsel would be an advocate in Philadelphia against the Plaintiffs here [although their interests might end up being parallel.

There are other potential sources of conflict, but the conclusion cannot be avoided. Although conflicts can be waived, Counsel understands that disciplinary complaints cannot; and legal claims may not be waived in certain jurisdictions because of public policy. LR83.51.8(h), (i). Accordingly, despite this Court's unequivocal statements that disparaging lawyers is "a waste of time," SSI has succeeded in driving at least a theoretical wedge between Counsel and his clients. Unfortunately, appearances of conflict are compelling to Disciplinary authorities, regardless of the practical implications. Only a stay or other effective disposition of the claims in the Phila against the Sanchez Defendants would eliminate the conflict here.

This Court has previously stated that it will not be involved in deciding the merits of a controversy in another court. Notwithstanding, that controversy has now infected the attorney-client relationship between Counsel and the Plaintiffs here. A lawyer cannot avoid impairment to judgment, or possible breach of absolute loyalty, when matters of potential litigation from clients hang like an axe over his head.

III. LIMITATIONS ON FURTHER DISCLOSURE

Due to issues relating to attorney-client privilege, Counsel cannot at this time discuss any other reasons that would allow withdrawal. The issues are serious. Counsel will do so if requested by the Court. Counsel would then request that any written or oral explanation be made *in camera or under seal*. Moreover, because the Court is the trier of fact in this

case, Counsel would respectfully suggest referral of any explanatory presentation to another judge of this Court.

IV. COMPLIANCE WITH OBLIGATIONS OF FAIRNESS TO CLIENT

Counsel notified Plaintiffs on several occasions of Counsel's intention to withdraw as counsel of record and of Counsel's reasons for withdrawal. Plaintiffs have failed to respond with any written communication that would possibly obviate the issue of withdrawal. Plaintiffs are lawyers themselves, and have access to the electronic and other records of this court for ascertaining impending hearing dates or other time-sensitive deadlines in this matter. Plaintiffs have co-counsel already, but have been advised to retain alternate counsel. Plaintiffs have also previously had one of their partners appear for them.

After withdrawal, Plaintiffs can remain represented by current local co-counsel. Given the high profile this case has assumed, as a result of this Court's opinions, Counsel believes Plaintiffs may quickly obtain alternative counsel. Further, at Counsels' suggestion, Counsel believes that Plaintiffs have already consulted other counsel on the reasons which prompt this motion to withdraw and on representing them in the litigation.

Counsel has advised Plaintiffs of Counsel's willingness to make Client's file available and to cooperate with new counsel, provided Counsel's accrued compensation is protected in accordance with Pennsylvania law relating to attorneys' retaining liens. Notwithstanding, Counsel believes that the most important part of Counsel's contribution to the case is

documented in briefs filed with this Court and are thus available.

At a hearing on June 14, 2004, attended by Plaintiffs, the Court commented that this case is still in its early stages. In addition, the Court gave fair warning that Counsel could be removed in the future for certain actions. It appears, therefore, that withdrawal by Counsel at this early stage of the litigation will not prejudice Plaintiffs. Since withdrawal can be affected "without material prejudice to the client," the Court should grant this motion to withdraw on the terms recited in the proposed form of order.

V. CONCLUSION

In light of the foregoing, the undersigned attorney respectfully requests that this Court grant Counsel's motion to withdraw as counsel of record for Plaintiff, and/or that the Court order such relief as necessary and appropriate under the circumstances.

Respectfully submitted,

John J. Koresko, V, Esquire
200 W. 4th St.
Bridgeport, PA 19405
Tel: 610-992-2200
CO-COUNSEL FOR PLAINTIFF

Dated: July 5, 2004

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, et al.		
Plaintiff	:	No. 03-CV-1550
v.	:	
	:	Judge Matthew Kennelly
WAYNE BURSEY, et al.	:	Room 2106
Defendant	:	

ORDER PERMITTING WITHDRAWAL OF ATTORNEY
JOHN J. KORESKO, V, ESQUIRE

JOHN J. KORESKO, V, ESQUIRE, counsel for the Plaintiffs having submitted his Motion to Withdraw as Counsel of record for Plaintiffs, and it appearing that all requirements of the Rules of Professional Conduct have been satisfied, the Motion is hereby GRANTED.

Mr. Koresko may effectuate his withdrawal by filing a Notice of Withdrawal with the Clerk. However, if within ten (10) days of this Order, and prior to filing said Notice, Mr. Koresko and Plaintiffs reach a resolution that would eliminate Mr. Koresko's reasons for seeking to withdraw as counsel, Mr. Koresko may withdraw the Motion and shall promptly inform the Court in writing.

So ORDERED this ____ day of _____, 200

MATTHEW KENNELLY, J.

EXHIBIT A

ASSESSMENT OF DAMAGES
HEARING IS REQUIRED

SILVERSTEIN & BELLIN, LLC
BY: IRA B. SILVERSTEIN
I.D. No 17658
1525 Locust Street
Suite 300
Philadelphia, PA 19102
(215) 670-0001

STEP Plan Services, Inc.	: Court of Common Pleas
100 Grist Mill Road	: Philadelphia Count
Simsbury, CT 06070	: Civil Action
Plaintiff,	:
v.	: March Term, 2004
John Koresko, 5th , Lawrence	: No. 007718
Koresko, Koresko & Assoc.,	:
P.C., Koresko Financial, L.P.	: Commerce Program
and Penn-Mont Benefit Srvcs	:
Inc.,	: Jury Demand
	:
Capitals Financial, LLC	:
815 Interchange Building	:
600 South Highway 169	:
Minneapolis, MN 55426	:
	:
Anderson Kill & Olick, P.C.	:
1251 Avenue of the Americas	:
New York, NY 10020	:
	:
Virginia I. Miller	:

c/o Anderson Kill & Olick :
1600 Market Street :
Philadelphia, PA 19103 :
:
Lawrence S. Fischer :
c/o Anderson Kill & Olick :
190 LaSalle Street, Ste 800 :
Chicago, IL 60603 :
:
Community Trust Company :
and Lowell R. Gates, :
3907 Market Street :
Camp Hill, PA 17011 :
:
Arrow Drilling Co., Inc., and :
Nestor Garza, Jr. :
P.O. Box 505 :
Benavides, TX 78341 :
:
Sanchez & Daniels, :
Manuel Sanchez and :
John Daniels :
333 W Wacker Drive, Ste500 :
Chicago, IL 60606 :

COMPLAINT

Notice

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance person-

ally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONECE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Lawyer Reference Service

One Reading Center

215-238-1701

SILVERSTEIN & BELLIN, LLC
BY: IRA B. SILVERSTEIN
I.D. No 17658
1525 Locust Street
Suite 300
Philadelphia, PA 19102
(215) 670-0001

Attorney for Plaintiff
STEP Plan Services, Inc.

STEP Plan Services, Inc.	: Court of Common Pleas
100 Grist Mill Road	: Philadelphia Count
Simsbury, CT 06070	: Civil Action
Plaintiff,	:
v.	: March Term, 2004
John Koresko, 5th , Lawrence	: No. 007718
Koresko, Koresko & Assoc.,	:
P.C., Koresko Financial, L.P.	: Commerce Program
and Penn-Mont Benefit Srvcs	:
Inc.,	: Jury Demand
	:
Capitals Financial, LLC	:
815 Interchange Building	:
600 South Highway 169	:
Minneapolis, MN 55426	:
	:
Anderson Kill & Olick, P.C.	:
1251 Avenue of the Americas	:
New York, NY 10020	:
	:
Virginia I. Miller	:
c/o Anderson Kill & Olick	:
1600 Market Street	:

Philadelphia, PA 19103 :
:
Lawrence S. Fischer :
c/o Anderson Kill & Olick :
190 LaSalle Street, Ste 800 :
Chicago, IL 60603 :
:
Community Trust Company :
and Lowell R. Gates, :
3907 Market Street :
Camp Hill, PA 17011 :
:
Arrow Drilling Co., Inc., and :
Nestor Garza, Jr. :
P.O. Box 505 :
Benavides, TX 78341 :
:
Sanchez & Daniels, :
Manuel Sanchez and :
John Daniels :
333 W Wacker Drive, Ste500 :
Chicago, IL 60606 :

COMPLAINT

Parties

1. Plaintiff is STEP Plan Service, Inc. ("STEP Services"), a Delaware corporation with its principal place of business located ate 100 Grist Mill Road, Simsbury, Connecticut 06070. STEP Services is the fiduciary and Plan Sponsor of the

STEP Plan & Trust f/k/a the STEP Multiple Employer Supplemental Benefit Plan & Trust (the "STEP Plan"). The STEP Plan is a multiple employer welfare benefit plan designed to comply with the requirements of Section 419A(f)(6) of the Internal Revenue Code.

2. Defendants are:

a) John J. Koresko, V, ("Koresko"), a Pennsylvania citizen with a business address of 200 West 4th Street, Bridgeport, Pennsylvania 19405. Koresko is a licensed attorney and certified public accountant. He ultimately controls, either directly or indirectly, defendants Penn-Mont Benefit Services, Inc., Koresko Financial, L.P. and Koresko & Associates, P.C;

b) Lawrence Koresko, a Pennsylvania citizen with a business address of 200 West 4th Street, Bridgeport, Pennsylvania 19405. Lawrence Koresko is Koresko's brother and, with respect to the matters at issue, has at all times been an agent and representative of Koresko and entities Koresko controls;

c) Koresko & Associates, P.C. (the "Koresko Law Firm"), a Pennsylvania professional corporation with a principal place of business located at 200 West 4th Street, Bridgeport, Pennsylvania 19405. The Koresko Law Firm is controlled, directly or indirectly, by Koresko;

d) Koresko Financial, L.P. ("Koresko Financial"), a Pennsylvania limited partnership with a principal place of business located at 500 North Gulph Road, Suite 110, King of Prussia, Pennsylvania 19406 and/or 200 West 4th Street,

Bridgeport, Pennsylvania 19405. Koresko Financial, whose general partner is Penn-Mont Benefit Services, Inc., is an insurance agency and/or brokerage firm ultimately controlled by Koresko and Lawrence Koresko;

e) Penn-Mont Benefit Services, Inc. ("Penn-Mont"), a Pennsylvania corporation with a principal place of business located at 200 West 4th Street, Bridgeport, Pennsylvania 19405. Penn-Mont is an employee benefits firm that sponsors various multiple employer welfare benefit and retirement plans, including the Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Trust (the "REAL VEBA"). Penn-Mont is a direct competitor of STEP Services by virtue of Penn-Mont's sponsorship of various multiple employer welfare benefit plans. The REAL VEBA competes directly with the STEP Plan. Penn-Mont is controlled, directly or indirectly, by Koresko and Lawrence Koresko;

f) Capitas Financial, LLC ("Capitas"), a Minnesota limited liability company with a principal place of business at 815 Interchange Building, 600 South Highway 169 Minneapolis, MN 55426-1219. Capitas is an association of life insurance brokers. Koresko Financial is a Capitas "partner" and Penn-Mont is a Capitas "preferred provider." With respect to all matters at issue in this complaint, Koresko, Lawrence Koresko, Koresko Financial, Penn-Mont and the Koresko Law Firm have acted as agents of Capitas;

g) Anderson Kill & Olick, P.C. ("Anderson Kill"), a national law firm with an office at 1600 Market Street, Philadelphia, Pennsylvania. At various times relevant to

this complaint, Anderson Kill has represented defendants Koresko, the Koresko Law Firm, Penn-Mont, Arrow Drilling Co., Inc., and Sanchez & Daniels in conjunction with Koresko's efforts to improperly advance his competitive position vis-à-vis STEP Services;

h) Virginia I. Miller, an attorney in Anderson Kill's Philadelphia office. Ms. Miller has had primary responsibility for Anderson Kill's representation of Koresko, the Koresko Law Firm, Penn-Mont, Arrow Drilling Co., Inc., and Sanchez & Daniels;

i) Lawrence S. Fischer an attorney in Anderson Kill's Chicago office. Mr. Fischer had primary responsibility for the Chicago aspects of Anderson Kill's representation of Koresko, the Koresko Law Firm, Penn-Mont, and Sanchez & Daniels;

j) Community Trust Company ("Community Trust"), a Pennsylvania company headquartered at 3907 Market Street, Camp Hill, Pennsylvania. Community Trust acts as a trustee for Penn-Mont benefit plans, including the REAL VEBA;

k) Lowell R. Gates, a Pennsylvania resident with a business address at 3907 Market Street, Camp Hill, Pennsylvania. Mr. Gates is the Community Trust principal with primary responsibility for Koresko-related matters;

l) Arrow Drilling Co., Inc., ("Arrow Drilling"), a Texas corporation with offices at P.O. Box 505, Benavides, Texas 78341;

m) Nestor Garza, Jr., a Texas resident with offices at P.O. Box 505, Benavides, Texas 78341. Mr. Garza is a principal of Arrow Drilling;

n) Sanchez & Daniels, a Chicago law firm with offices at 333 W. Wacker Drive, Suite 500, Chicago, IL 60606;

o) Manuel Sanchez, a named partner in Sanchez & Daniels.

p) John Daniels, a named partner in Sanchez & Daniels.

Jurisdiction and Venue

3. Jurisdiction and venue are appropriate in Philadelphia County as substantial transactions and occurrences took place within the county out of which the causes of action set forth below arose.

4. The STEP Plan is a multiple employer welfare benefit plan designed to comply with the requirements of Section 419A(f)(6) of the Internal Revenue code. "419 Plans" are utilized primarily by small business owners, professional partnerships and other closely held businesses to reduce their taxable income while at the same time providing health and welfare benefits to their employees. Employers' contributions to these plans are tax-deductible and not reportable as current income to the plan participants (*i.e.*, employees and/or their beneficiaries). Typically, 419 Plans use the contributions, in part, to purchase insurance policies from insurance carriers to "reinsure" the contingent liability owed to the employee or beneficiary for severance or death benefits. Upon a severance or death event, the plan collects on the in-

surance policy or borrows the cash value from the policy, and pays out its contractual commitment to the employee (in the case of severance) or employee's beneficiary (in the case of death). Such payments are generally tax-advantaged to the employee and/or his beneficiary.

5. In recent years, the number of 419 Plans has been reduced because the Internal Revenue Service ("IRS") has challenged some of these plans as offering "deferred compensation in disguise," which, if true, would render their professed tax benefits invalid. In light of these concerns, there are currently only a handful of bona fide 419 Plans in United States.

6. The STEP Plan (which only offers severance benefits) is a bona fide 419 Plan and at one time during the events alleged herein had over $200 million of life insurance policies in force. Plaintiff STEP Services is the Plan Sponsor of the STEP Plan.

7. One of the few major competitors of the STEP Plan is "REAL VEBA," a plan sponsored by defendant Penn-Mont and trustee by defendant Community Trust.

8. In a marketing circular dated October 21, 2001, and distributed to its insurance brokers across the country, The Hartford Life Insurance Company ("The Hartford") listed both the STEP Plan and the REAL VEBA, *inter alia*, as 419 Plans in which The Hartford made its life insurance products "available for use." Endorsements of 419 Plans by large insurance carriers, like The Hartford, are integral to the success of any 419 Plan because the plans are not marketed directly to consumers (*i.e.*, employers or participants), but rather through licensed insurance brokers. In other words, the "di-

rect customer" in the 419 Plan market is the insurance broker who recommends the plan to the employer, the "ultimate customer."

9. Koresko, through his interest in the Penn-Mont REAL VEBA plan, competes directly with STEP Services in marketing 419 Plans to insurance brokers and in securing insurance companies who will make their policies available to reinsure 419 Plan benefits.

Koresko Initiates His Unlawful Scheme To Remove STEP Services as a Competitor

10. STEP Services took over the administration of the STEP Plan in February 2002 and together with its sister company, Benistar 419 Plan Services, Inc. ("Benistar") vaulted ahead of all other competitors in the 419 Plan market. Benistar is the Fiduciary and Plan Sponsor of the Benistar 419 Plan & Trust (the "Benistar 419 Plan"), which also is a multiple employer welfare benefit plan designed to comply with the requirements of Section 419A(f)(6) of the Internal Revenue Code.

11. In response to the growth of STEP/Benistar, Koresko, Penn-Mont's founder, began to make defamatory and disparaging remarks about STEP Services and Benistar to other 419 Plans, to various insurance carriers such as The Hartford, to insurance brokers across the country, and even to federal government officials. In making these defamatory and disparaging remarks, Koresko was acting individually and as officer, director and/or partner of Penn-Mont, Koresko Financial and the Koresko Law Firm (collectively, "the Koresko Institutional Defendants").

12. When the IRS issued new proposed regulations governing 419 Plans in July 2002, Koresko used the event to further defame STEP and Benistar in the marketplace by falsely claiming to insurance carriers and brokers across the country that the STEP and Benistar plans did not conform to the new proposed regulations. Specifically, Koresko made defamatory and disparaging remarks to the Hartford about STEP and Benistar. Koresko alleged not only that STEP and Benistar failed to comply with the new proposed IRS regulations, but, also cast aspersions on (i) the manner in which STEP Services and Benistar marketed the plans; (ii) deductibility of contributions made to the plans; (iii) other matters regarding the operations of STEP Services and Benistar; and (iv) the "bona fides" of the STEP and Benistar Plans. The comments and communications defamed, disparaged and damaged STEP Services and the STEP Plan in the 419 Plan and insurance brokerage markets.

13. As a result of the defamatory and disparaging comments made to The Hartford by Koresko, The Hartford – in a marketing circular dated August 12, 2002 sent to brokers of The Hartford across the country-announced that "[e]ffective immediately, The Hartford will not accept any new business written in connection with the Benistar 419 Plan."

14. Unsatisfied with the damage being done to STEP Services and Benistar by his defamatory statements, Koresko determined to use his dual role as a competitor and an attorney to further wrongfully impede the ability of STEP Services and Benistar to compete with Penn-Mont. He commenced soliciting current and/or former employers and participants in the STEP and Benistar plans to act as plain-

tiffs in frivolous and vexations litigation against STEP Services and Benistar. Upon information and belief, Koresko did not disclose his dual role to the solicited employers and participants when making the solicitations.

15. Having succeeded in convincing two participating employers in the STEP and Benistar Plans – out of hundreds solicited in mass mailings and through insurance brokers – to lend their names to planned litigation, Koresko sent a demand letter dated September 23, 2002 to STEP Services and Benistar. The letter leveled various scurrilous and frivolous accusations against Benistar and the STEP Plan and threatened litigation if STEP Services and Benistar failed to transfer certain plan assets in accordance with Koresko's wishes to defendant Community Trust. To further this scheme to marry his personal business interests with frivolous litigation ostensibly brought on behalf of clients, Koresko obtained the aid and assistance of defendants Anderson Kill, Miller and Fischer (together the "Anderson Kill Defendants"). The Anderson Kill Defendants agreed to act as co-counsel in the litigation Koresko brought and,upon information and belief, agreed to take direction from Koresko, as opposed to the named parties they claimed to represent, as well as split any recoveries between themselves. In addition to "representing" the nominal plaintiffs solicited by Koresko, the Anderson Kill Defendants represented by Koresko and his companies and the REAL VEBA. Upon information and belief, the Anderson Kill Defendants must have known that the litigation was designed primarily to benefit Koresko's personal business interests as opposed to the interests of the nominal clients.

16. One of the nominal plaintiffs Koresko and Anderson Kill claimed to represent, and on whose alleged behalf they instituted suit, was a company called Palm Valley Health Care, Inc., ("Plam Valley"). Palm Valley was solicited by Koresko. This purported "client" of Koresko and Anderson Kill, however, has averred that it never authorized litigation to be commenced in its name.

17. Koresko, the Koresko Institutional Defendants and the Anderson Kill Defendants did secure the cooperation of Defendants Arrow Drilling, Garza, Sanchez & Daniels, Manuel Sanchez and John Daniels (together the "Litigant Defendants"), who all agreed to served as nominal plaintiffs to aid Koresko in his scheme. Upon information and belief, the Litigant Defendants were not required to pay for the litigation and were promised lucrative benefits to serve as nominal plaintiffs. Koresko and Anderson Kill even filed suit on behalf of participant employers who had not authorized the litigation.

18. In a letter dated September 23, 2002, Koresko sent a demand letter to STEP Services and the STEP Plan on behalf of Sanchez & Daniels in which various scurrilous and frivolous accusations were leveled against Benistar and the STEP Plan. The letter threatened litigation if STEP Services and the STEP Plan failed to transfer certain plan assets in accordance with Koresko's wishes to defendant Community Trust. The demanded transfers would, effectively, serve to move the assets to Koresko's control at defendant Community Trust and position Koresko's companies to supplant STEP Services as the employer's 419 Plan provider.

19. When STEP Services and Benistar did not immediately accede to the extortion, Koresko and Anderson Kill carried out Koresko's threat by immediately filing suit against STEP Services and the STEP Plan in the Philadelphia Court of Common Pleas by way of Writ of Summons. Koresko and Anderson Kill were so cognizant of Koresko's dual role and interests in this litigation that they actually named Koresko as a party plaintiff. That case was subsequently removed to the United States District Court for the Eastern District of Pennsylvania.

20. Even though no complaint was filed until December 3, 2002, in mid-October 2002, Koresko, acting both individually within the scope of his authority and as officer, director; and/or partner of the Koresko Institutional Defendants, sent an email to the Hartford stating:

> "The complaint [in Pennsylvania] has not yet been filed. . .It will contain counts for Breach of Fiduciary Duty and Deceptive Insurance Trade Practices. . ."
>
> "Carpenter is in serious trouble on this. Jefferson Pilot we believe is involved up to their necks. I hope Hartford has not been involved. . ."
>
> "As Hartford has banned the Benistar boys I would suggest a protective step – I think that Hartford ought to demand Benistar transfer Hartford related STEP Plan assets to another fiduciary." (Emphasis added).
>
> "You guys have already made a good first step."

21. As a direct consequence of Koresko's actions, on October 7, 2002, The Hartford sent an email to brokers across the country announcing a marketing teleconference it planned to hold "419 Plans" and such email omitted any mention of the STEP and Benistar Plans as possible 419 Plans for Hartford brokers to use in the upcoming year end busy season.[1]

22. Concerned about The Hartford's "termination" of the Benistar 419 Plan (and by implication the STEP Plan as well), STEP Services and Benistar scheduled a meeting at The Hartford's offices on October 15, 2002 with The Hartford's representatives.

23. At the meeting, Wade Seward (The Hartford's Assistant Vice President of Individual Life Market Conduct & Compliance) asked, "What's going on with the Pennsylvania litigation?," even though the Pennsylvania complaint had not yet been filed.

24. Following the October 15th meeting, in a letter dated November 19, 2002, The Hartford advised Benistar that it was rescinding its prior "termination" of the Benister 419 Plan and, consequently, would "issue new polices to the Benistar 419 Plan." The Hartford reiterated its decision in a letter to Benistar dated November 25, 2002 that stated that "[e]ffective immediately, The Hartford is now accepting ap-

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[1] The last calendar quarter is the busiest time of the year in the 419 Plan and insurance brokerage markets as employers and individuals adopt benefits, insurance and tax strategies before December 31st.

plications for business written in connection with the Benistar 419 Plan."

25. On November 14, 2002, at a public hearing on the proposed final 419 Plan regulations held at the Internal Revenue Services in Washington, D.C., Koresko, acting both for his own benefit and the benefit of the Koresko Institutional Defendants, made further defamatory and disparaging remarks in public about STEP Services and Benistar.

Koresko Takes His Scheme Further

26. During the first week of December 2002, Koresko, the Koresko Law Firm, Anderson Kill and Miller, with the consent of Sanchez & Daniels, determined to use the case initiated on behalf of Sanchez & Daniels to seek to shut down STEP Services and the STEP Plan. They sought and obtained an *ex parte* temporary restraining order ("TRO") against STEP Services and the STEP Plan on December 3, 2002. The TRO was issued by Judge Legrome Davis of the United States District Court for the Eastern District of Pennsylvania and was obtained by "sharp practice" designed to prevent STEP Services from being effectively represented by not providing meaningful notice. Moreover, Koresko, Miller and Anderson Kill misrepresented or hid Koresko's dual status (as an attorney and competitor of STEP Services) from the court. The TRO was timed to inflict maximum damage upon STEP Services, as the end of the year is the peak season for sale 419 Plans.

27. The TRO was also obtained under false pretenses and the mispresentated guise of an emergency regarding certain life insurance polices that had already been surrendered a year and half before the TRO was requested. The nominal plaintiff, Sanchez & Daniels, had voluntarily terminated from the STEP Plan in March 2001 after having had constructively withdrawn from the STEP Plan by failure to contribute after 1999. The policies at issue in the TRO had been surrendered with Sanchez and Daniels consent in July, 2001. Moreover, although the action had been instituted by writ of summons in September of 2002, the Defendants made no effort to prosecute the claim before seeking the "emergency" *ex parte* TRO in December. The fax from Miller and Koresko announcing that they would be seeking the TRO was sent late in the evening the day before to Wayne Bursey, the president of STEP services, who was scheduled to undergo cancer surgery the very next day. Literally, Mr. Bursey was on the operating table at the time Miller was obtaining the TRO under false pretenses.

28. The *ex parte* TRO had the effect of essentially shutting down STEP Services and Benister during one of the busiest months of the year (December) in the 419 Plan market. The existence of the TRO caused damage to STEP Services and the STEP Plan in terms of lost business, both with respect to future business and the cancellation of existing business.

29. The complaint filed along with the request for the TRO contained numerous false, misleading and defamatory statements, and sought, *inter alia*, removal of STEP Services as the fiduciary of the STEP Plan, and transfer of the STEP

Plan's assets from J.P. Morgan Chase Bank (one of the largest banks in the world) to defendant Community Trust.

30. Upon information and belief, Community Trust, which serves as the trustee of REAL VEBA assets, was informed by Koresko that he was commencing litigation, ostensibly on behalf of others but, in reality, on his own behalf and on behalf of the companies he controlled, with the hope of having STEP Plan assets transferred to the control of Koresko's companies for the mutual benefit of Koresko and Community Trust. Upon information and belief, Community Trust agreed to support this plan of action by agreeing to serve as trustee of any transferred assets.

31. Still not satisfied with the damage he had wreaked, Koresko commenced exploiting the *ex parte* TRO as purported proof of his defamatory statements concerning STEP Services and Benistar. Koresko, acting both individually and with the scope of his authority as officer, director, and/or partner of the Koresko Institutional Defendants, began sending disparaging and false communications to insurance carriers, insurance brokers, other persons across the country involved in the 419 Plan industry, and even federal government officials. The communications contained false, misleading, disparaging and defamatory statements about STEP Services and Benistar, as well as misstatements regarding the TRO. Koresko and Miller attempted to use the conditional privilege accorded to pleadings filed in court proceedings to mask their commercial defamation of STEP Services and Benistar.

32. On December 9, 2002, Koresko sent an email to Anderson Kill quoting 28 U.S.C. § 664 (theft or embezzlement from employee benefit plan) and § 1956 (money laundering). On December 13th, Koresko forwarded the December 9th email to John Reid, Esq., an attorney at Edwards & Angell, the law firm which serves as outside ERISA counsel to Benistar and STEP Services, after having previously telephoned Attorney Reid to threaten him with criminal prosecution. This email stated:

> "Sorry you couldn't talk to me. I attached some US Code provisions FYI."
>
> "The amended complaint is going to show illegal acts that may fall under these provisions."
>
> "I really wanted to give you guys a way out short of public litigation. The [U.S. Department of Labor] is most likely going to get involved."

This email reveals the intent of Koresko, the Koresko Law Firm, and Anderson Kill to file frivolous, vexatious and sham litigation against STEP Services and Benistar, unless STEP Services and Benistar acceded to Koresko's demands. Moreover, by threatening to contract the government and make criminal accusations to gain and advantage in a civil proceeding, Koresko engaged in professional and ethical misconduct in the practice of law.

33. On December 16, 2002 – and unbeknownst to STEP Services and Benistar – Koresko, acting both individually and within the scope of his authority as officer, director, and/or partner of the Koresko Institutional Defendants, sent an

email to Patrick Smith at The Hartford. This email, entitled "Notice of Litigation Against Benistar, STEP, etc.," stated:

> "You will recall our discussion a few months ago regarding the pending claims my clients have against BENISTAR/STEP. We had reason to believe that Daniel Carpenter, an agent of Hartford and Jefferson-Pilot was looting STEP assets. . .I told you and your colleagues about this and requested that you pass the information onto the appropriate parties. You requested updates as the litigation progressed. According to our inquiry, CARPENTER'S activities continued."
>
> "Although you originally barred Hartford agents from doing business with BENISTAR, Hartford changed its policy not long ago and continued to [do] business with BENISTAR."
>
> "A class action lawsuit was filed against BENISTAR and the fiduciaries associated with STEP Plan. I sent you a copy of the TRO memo in this case. A preliminary injunction hearing is scheduled for January 13, 2003."
>
> "*I hope we can count on your co-operation.* You obviously know that we will be seeking rescission of any misapplied assets and the marshalling of same. Perhaps you can advise Hartford to stipulate to a consent order to that effect and other relief." (Emphasis added).

"The Boston Globe reported on December 12 that BENISTAR and CARPENTER had a $9 million judgment entered against them . . .We are preparing to file a class action suit today on behalf of all [Benistar 419 Plan] participants to appoint a receiver for those plans, to marshall [sic] the assets, to rescind, and for other relief."

"We wish to take discovery on an expedited basis. Basically, we want the files on all BENISTAR cases . . . placed within the last 6 years . . . We also want documentation referencing STEP, BENISTAR, BENISTAR 419 Plan Services, Inc., Benistar Administration Services, Inc., BENISTAR STEP Plan Services, Inc., BENISTAR 419 Plan (& Trust), BENISTAR Advantage 419 Plan (& Trust), Advantage (419 Plan), and Carpenter. Please tell me if you will voluntarily cooperate."

"We hereby request that Hartford freeze all policies that reflect ownership by any of the BENISTAR companies or trusts."

34. As a direct consequence, on December 23, 2003, in a marketing notice sent to Hartford brokers across the country, The Hartford announced the following:

"Benistar 419 Plans: The Hartford Not Accepting New Business" (emphasis in original)

> "Please be advised, The Hartford is not accepting any business written in connection with the Benistar 419 Plan."

35. Although the body of this notice refers only to the Benistar 419 Plan, the title refers to "Benistar 419 Plans, "which had the effect in the 419 Plan market of alerting Hartford brokers across the country not to do business with Benistar, the Benistar 419 Plan or the STEP Plan.

36. In a letter faxed to Benistar on December 23, 2002, the Hartford shocked STEP Services and Benistar and all of the 419 Plans administered by Benistar:

> "In light of recent developments involving various Benistar entities and principals of these entities, we have decided that Hartford Life Insurance Company and Hartford Life and Annuity Insurance Company will no longer accept business in connection with *Benistar 419 plans*." (Emphasis added).
>
> "Our previous letters of November 19, 2002 and November 25, 2002 are no longer effective and may not be used by Benistar as reflecting Hartford's position."

37. On December 17, 2002, Koresko, the Koresko Law Firm, Miller and Anderson Kill filed a new lawsuit –this time against Benister and the Benister 419 Plan – in the Eastern District of Pennsylvania making virtually the same allegations as their previous lawsuit on behalf of Sanchez & Daniels had made against the STEP Plan. Miller and Anderson Kill also sent a letter to Benistar dated December 17th

advising of their intention to seek an enlargement of the *ex parte* TRO to include the Benistar 419 Plan, as well as to seek a receiver over all of the assets of *both* the STEP Plan and the Benistar 419 Plan and the transfer of all such assets from J.P. Morgan Chase Bank (the current trustee of the STEP and Benistar Plans and one of the largest banks in the world) to defendant Community Trust.

38. The damage inflicted upon the STEP Plan by The Hartford's second "termination," in conjunction with Koresko's dual-prolonged litigation assault against STEP/Benistar was, and continues to be, substantial. As a direct and proximate cause of the wrongful acts of the defendants alleged herein, the STEP Plan has lost approximately 750 million in business (including lost profits).

Koresko Expands His Defamation of STEP Services and Benistar

39. On January 9, 2003, the Honorable Legrome D. Davis of the Eastern District of Pennsylvania held a status conference on the litigation brought in the name of Sanchez & Daniels. At this status conference, Judge Davis asked Koresko whether, in fact, he was a principal of Penn-Mont and a competitor of Benistar. Koresko not only denied that he was a principal of Penn-Mont (claiming only that he provided "legal services" to Penn-Mont), but he also denied – in response to a pointed query from Judge Davis – that he had sent out numerous communications to insurance carriers and brokers regarding the issuance of the TRO. Anderson Kill, in attendance at this status conference, though aware that the court was being misled, failed to correct the falsehood. This

conduct on the part of Anderson Kill constituted a violation of the legal canon of ethics because Anderson Kill, through its silence, was not candid with the tribunal.

40. The very morning of the January 9th status conference, Koresko, acting both individually and within the scope of his authority as officer, director, and/or partner of the Koresko Institutional Defendants, sent (or instructed Lawrence Koresko to send) an email to an insurance broker that included the following false, defamatory and libelous statements:

> "Anyone who continues to market [the Benistar 419 Plan] should consider his legal liability."
>
> "Two lawsuits have been filed in Philadelphia naming Daniel Carpenter and his BENISTAR affiliates as defendants. One involves the Benistar STEP Plan and the other involves the BENISTAR 419 Plans. My clients have been harmed by self-dealing and churning of plan assets."
>
> "In the STEP case, Benistar lied to clients about their 'options' and fraudently induced them to churn STEP plan assets and buy new policies in the Benistar 419 Plan."
>
> "Carpenter has been pulling a ruse in the BENISTAR plan. . .the Benistar plan. . . . is void and a fraud."

> "Benistar breached its fiduciary duties by suggesting that people engage in an illegal act as an inducement to participation."
>
> "The foregoing are uncontroverted facts. That's why a Temporary Restraining order was issued by the Philadelphia Court."
>
> "We are seeking additional plaintiffs for the class action to take apart the Benistar plan."
>
> "Benistar has been contacting clients and offering 'incentives' to keep them from suing. This is unethical and possibly constitutes felony witness tampering."
>
> "*My suggestion to any of your clients is to adopt another welfare plan with a credible sponsor.* In addition, we respectfully request that any client hire us to represent him in the action to obtain return of the money already sent to BENISTAR." (Emphasis added).

This email was sent virtually at the same time that Koresko sat in the chambers of a federal judge on the afternoon of January 9, 2003, and denied sending (or having knowledge of) any such missives.

41.Koresko also stated in the January 9th email to the insurance broker:

> "Would you want your money controlled by somebody who was found guilty of defalcation $9 millon? ... The guy is bad news ...no sane person can

> ignore that a jury labeled him, his wife, and his partner as thieves...We could use as many plaintiffs in the case as possible."

42. On January 23, 2003, Judge Davis, after finally learning of Koresko's interests as a competitor and of the other ways in which he was misled into entering the *ex parte* TRO, granted the motion of STEP Services to dissolve the TRO and denied Sanchez & Daniels' application for a preliminary injunction.

43. Despite having trumpeted the TRO as part of his disparagement campaign, neither Koresko nor any of the other defendants sent out communications or informed the recipients of prior communications and emails that the TRO had been dissolved. In fact, in a communication sent after the TRO had been dissolved, Koresko answered queries concerning the TRO in a fashion clearly implying that the TRO was still in effect.

44. On February 4, 2003, Koresko sent proposed "client affidavits" to various insurance brokers. These "client affidavits" made false statements about representations allegedly made by STEP Services and Benistar to induce clients of the brokers to adopt the STEP and Benistar Plans. None of the "clients" would execute the false affidavits and, with the exception of Arrow Drilling and Sanchez & Daniels, none wished to participate in litigation.

45. In seeking to have insurance brokers assist him and Anderson Kill in soliciting "clients" to sue STEP Services and Benistar, Koresko acting both individually and within

the scope of his authority as officer, director, and/or partner of the Koresko Institutional Defendants, and as co-counsel with with Miller and Anderson Kill, stated to brokers that STEP Services or Benistar "is not a fit trustee," that Benistar trust is not set up properly," and that "by helping our clients join the class action lawsuit we could help them get their entire [contribution] back from Benistar."

46. Koresko also claimed that "he has evidence that Benistar tampered with witnesses with a $100K payoff, they are bad people and cannot be trusted." (Emphasis added).

47. When it became apparent that Koresko and Anderson Kill's deceptions had been discovered by the court, in February 2003, Koresko, Anderson Kill and Sanchez & Daniels filed a notice of voluntary dismissal, which was improper because leave of court was required, and, shortly thereafter filed a new, virtually identical complaint in state court in Chicago, Illinois (under the signature of defendant Lawrence Fischer). Dismissal of the case before the Judge was not effected until July of 2003.

48. On September 23, 2003, Judge Davis dismissed the companion case brought nominally on behalf of Arrow Drilling and Palm Valley. In his written order, Judge Davis found that Koresko engaged in a "janus-faced argument" and "wasted this Court's time."

49. Since the date, Koresko, Miller, Anderson Kill and other defendants have continued in their efforts to eliminate STEP Services and Benistar as competitors. This has been done primarily through the litigation pending in Chicago, now removed to the United States District Court for the Eastern

District of Illinois. In that lawsuit, defendants have renewed their efforts to obtain a preliminary injunction of the type denied by Judge Davis. They still seek to have Community Trust substituted as custodian of STEP Plan assets and, through that device, to place Koresko in control of his competitor's business.

50. Defendants have also continued to be "Janus-faced." The United States Department of Labor has been investigating Koresko, Penn-Mont and the REAL VEBA. In aid of their investigation, the Department of Labor has subpoenaed various documents but Koresko, through Anderson Kill, has challenged the subpoenas, claiming that his 419 Plans are not covered by ERISA. Yet, in the Chicago litigation as well as the dismissed Philadelphia cases, Koresko and Anderson Kill based their claims on the contention that 419 Plans, as long as they are sponsored by competitors, are covered by ERISA.[2]

Damages Summary

51. As a consequence of the above-described wrongful conduct, STEP Services has suffered and continues to suffer substantial harm and damage.

52. In addition to approximately $50 million in business, profits and/or business opportunities lost, STEP Services has

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[2] Also See REAL VEBA v. Sidney Charles Markets, 2003 U.S. Dist. LEXIS 1380 (E.D. Pa. Jan. 31, 2003) (involving a suit between Penn-Mont and a participating employer in the REAL VEBA).

incurred approximately $2 million in attorneys' fees and cost in defending the sham, vexatious and frivolous claims brought by Koresko and the Anderson Kill Defendants (with the assistance of the other defendants) on behalf of Sanchez & Daniels and Arrow Drilling.

53. STEP Services also seeks injunctive relief against Koresko and the Anderson Kill Defendants, enjoining them from publishing any further disparaging, defamatory or libelous statements (written or oral) against STEP Services, its fiduciaries and principals.

COUNT 1
(Common Law Commercial Disparagement)

54. Plaintiff incorporates and realleges the allegations contained in paragraphs 1 through 54 as if fully set forth herin.

55. The various statements made by Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as those made by the Anderson Kill Defendants, are false, defamatory and disparaging statements regarding the quality of Plaintiff's products and services.

56. Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, made these statements with actual knowledge that they have were false or with reckless disregard as to their truthfulness.

57. The statements were made with malice and with an intent of destroying Plaintiff's reputation and business.

58. In disparaging the qualities of Plaintiff's products, services and integrity, Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, sought to (i) gain a competitive advantage over Plaintiff in the markets; and (ii) put Plaintiff out of business.

59. Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, revealed the malicious and self-interested nature of their disparaging comments by coupling the false statements with insinuations and actual clear statements that legal liability and financial loss would befall anyone who did not switch to Plaintiff's competitors.

60. Plaintiff has been and continues to be greatly injured financially, as well as injured in name and reputation, because of the disparaging statements.

61. As a direct and proximate result of these false statements of fact, many existing and potential insurance carriers and customers of Plaintiff refrained from doing business with Plaintiff.

62. Moreover, as a direct and proximate result of these disparaging statements, many insurance brokers advised their

clients who would have done business with Plaintiff not to do so.

WHEREFORE, Plaintiff respectfully prays for judgment against defendants in an amount in excess of $100,000 in compensatory damages and an amount in excess of $100,000 in punitive damages. Plaintiff also requests such other and further relief, including attorneys' fees and cost, as this Court may deem just and proper.

COUNT II
(Defamation Per Se)

63. Plaintiff incorporates and realleges the allegations contained in paragraphs 1 through 62 as if fully set forth herein.

64. Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, defamed Plaintiff by publishing false statements of fact to untold hundreds of insurance carriers, brokers and other third parties across the country. As a result, Plaintiff has suffered damage to its business and reputation.

65. Specifically, Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, published and untold The Hartford and various insurance brokers that, among other things, Plaintiff was "looting" assets from the Step Plan, and that the Benistar 419 Plan was "a fraud."

66. These statements were defamatory because they were intended to and, in fact, did lead the recipients of such statements (including insurance carriers and brokers) to form falsely negative impressions of Plaintiff, and its products and services.

67. The false statements of fact about Plaintiff contained in the various communications published to third parties by Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, constitute defamation per se because the statements were false statements about Plaintiff's financial position, business methods and operations, and/or accused Plaintiff of fraud of mismanagement.

68. Koresko and Lawrence, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, made these statements knowing they were false or with reckless disregard of the truth.

69. Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors, partners and/or agents of the Koresko Institutional Defendantsm as well as the Anderson Kill Defendants, acted with malice and with an intent to destroy the business and reputation of Plaintiff.

70. Koresko and Lawrence Koresko, acting both individually and within the scope of their authority as officers, directors,

partners and/or agents of the Koresko Institutional Defendants, as well as the Anderson Kill Defendants, made unprivileged publications of the false statements regarding Plaintiff through a massive campaign of possibly thousands of emails and other communications that identified Plaintiff by name, and were sent to insurance carriers, brokers and other third parties across the country.

71. These defamatory statements have directly and proximately damaged Plaintiff.

WHEREFORE, Plaintiff respectfully prays for judgment against defendants in an amount in excess of $100,000 in compensatory damages and an amount in excess of $100,000 in punitive damages. Plaintiff also requests such other and further relief, including attorneys' fees and costs, as this Court may deem just and proper.

COUNT III
(Tortious Interference With Beneficial Business Relationships)

72. Plaintiff incorporates and realleges the allegations contained in paragraphs 1 through 71 as if fully set forth herein.

73. Plaintiff had valid and beneficial business relationships with The Hartford, other insurance carriers, insurance brokers and various 419 Plan employers and participants (collectively hereinafter, the "Business Relationship Parties").

74. All of the Defendants were aware of the valid and beneficial business relationships that existed between Plaintiff and the Business Relationship Parties.

75. All of the Defendants, acting in concert, made a false, defamatory and disparaging statements regarding the quality of Plaintiff's products, services and integrity.

76. These statements were made knowing they were false or with reckless disregard of the truth. The statements were made with malice intent of destroying Plaintiff's reputation and business.

77. All of the Defendants instituted frivolous lawsuits or assisted in the commencement and prosecution of such lawsuits for the sole purpose of damaging Plaintiff in the marketplace.

78. By these means, Defendants intentionally and unjustifiably induced many of the Business Relationship Parties to sever their beneficial business relationship with Plaintiff.

79. Directly by reason of Defendants' intentional interface with these valid and beneficial business relationships, Plaintiff has been and continues to be greatly injured financially, as well as injured in name and reputation.

WHEREFORE, Plaintiff respectfully prays for judgment against defendants in an amount in excess of $100,000 in compensatory damages and an amount in excess of $100,000 in punitive damages. Plaintiff also requests such other and further relief, including attorneys' fees and costs, as this Court may deem just and proper.

COUNT IV
(Tortious Interference with Prospective Economic Advantages)

80. Plaintiff incorporates and realleges the allegations contained in paragraphs 1 through 79 as if fully set forth herein.

81. Plaintiff has a reasonable expectation of entering into valid business relationships with countless potential insurance brokers and 419 Plan employers and participants.

82. All of the Defendants knew, or should have known, of Plaintiff's expectation of entering into these valid business relationship.

83. All of the Defendants intentionally and unjustifiably interfered (or assisted such inference) with Plaintiff's legitimate expectation of entering into these valid business relationships through the conduct described above.

84. Defendants' purposeful interference prevented Plaintiff's legitimate expectancy from ripening into valid business relationships.

85. Defendants' purposeful interference has damaged and continues to damage Plaintiff.

WHEREFORE, Plaintiff respectfully prays for judgment against defendants in an amount in excess of $100,000 in compensatory damages and an amount in excess of $100,000 in punitive damages. Plaintiff also requests such other and further relief, including attorneys' fees and costs, as this Court may deem just and proper.

COUNT V
(Abuse of Process)

86. Plaintiff incorporates and realleges the allegations contained in paragraphs 1 through 85 as if fully set forth herein.

87. By the conduct described above, all of the defendants abused the legal process against Plaintiff primarily to accomplish a purpose for which the process was not designed.

88. As a consequence, Plaintiff has suffered the severe harm described above.

WHEREFORE, Plaintiff respectfully prays for judgment against defendants in an amount in excess of $100,000 in punitive damages. Plaintiff also requests such other and further relief, including attorneys' fees and costs, as this Court may deem just and proper.

COUNT VI
(Malicious Prosecution)

89. Plaintiff incorporates and realleges the allegations contained in paragraph 1 through 88 as if fully set forth herein.

90. By the conduct described above, Koresko, the Koresko Law Firm, Miller, Anderson Kill, Sanchez & Daniels, Sanchez and Daniels, in instituting the action against Plaintiff in the Philadelphia Court of Common Pleas and in seeking a temporary restraining order and preliminary injunction in that action after it was removed to federal court, acted in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper

discovery, joinder of parties or adjudication of the claim on which the proceedings were based.

91. The Philadelphia Court of Common Pleas action, subsequently removed, and the requests for emergency injunctive relief have been terminated in Plaintiff's favor.

92. By the conduct described above, Koresko, the Koresko Law Firm, Miller, Anderson Kill, Arrow Drilling and Nestor Garza, in instituting the action against Plaintiff in the Philadelphia federal court, acted in grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based

93. As a consequence of these defendants' malicious prosecution of the Philadelphia actions, Plaintiff has suffered the severe harm described above.

WHEREFORE, Plaintiff respectfully prays for judgment against defendants in an amount in excess of $100,000 in punitive damages. Plaintiff also requests such other and further relief, including attorneys' fees and costs, as this Court may deem just and proper

SILVERSTEIN & BELLIN, LLC
BY: _____
IRA B. SILVERSTEIN
Attorney for Plaintiff
STEP Plan Services, Inc.

Dated: June 10, 2004

VERIFICATION

I, Wayne Bursey, President of STEP Plan Services, Inc., verify that the statements made in the foregoing Complaint are, to the best of my knowledge, true and correct. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S.A § 4904 relating to unsworn falsification to authorities.

_____

WAYNE BURSEY
President, STEP Plan Services, Inc.

DATED: June 10, 2004

CERTIFICATION OF SERVICE

I, Ira B. Silverstein, Esquire, hereby certify that I caused a true and correct copy of Plaintiff's Complaint, to be served on this date upon the following-by first class mail, postage prepaid:

Edward M. Dunham, Jr., Esq.
Duane Morris, LLP
One Liberty Place- 40th Fl.
Philadelphia, PA 19103-7395
Atty. For Anderson, Kill & Olick

John J. Koresko, V, Esq.
Koresko & Assoiciates, P.C.
200 W. Fourth Street
Bridgeport, PA 19405
Atty for Koresko & Associates

Steven D. Johnson, Esq.
Hecker, Brown, Sherry & Johnson
1700 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2769
Atty for Capitas Financial, LLC

John Daniel
333 W. Wacker Drive
Suite 500
Chicago, IL 60606

Lowell R. Gates
3907 Market Street
Camp Hill, PA 17011

Penn-Mont Benefit Services, Inc.
200 W. Fourth Street
Bridgeport, PA 19045

Community Trust Co.
3907 Market Street
Camp Hill, PA 17011

Lawrence Koresko
200 W. Fourth Street
Bridgeport, PA 19045

Nestor Garza, Jr.
P.O. Box 505
Benavides, TX 78341

Koresko Financial L.P.
200 W. Fourth Street
Bridgeport, PA 19045

Sanchez & Daniels
333 W. Wacker Drive
Suite 500
Chicago, IL 60606

Arrow Drilling CO., Inc.
P.O. Box 505
Benavides, TX 78341

BY: _____
IRA B. SILVERSTEIN

DATED: June 10, 2004

APPENDIX I – MOTION FOR CLASS CERTIFICATION, DATED APRIL 22, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, *et al.*,	) Case No. 03-CV-1550
Plaintiffs,	) Judge Matthew F. Kennelly
v.	)
WAYNE BURSEY, *et al.*	)
Defendants.	)

NOTICE OF MOTION

TO: All Counsel of Record
(See attached Service List)

PLEASE TAKE NOTICE that on Wednesday, April 28, 2004 at 9:30 a.m., or as soon thereafter as counsel may be heard, the undersigned will appear before the Hon. Matthew F. Kennelly, or any judge sitting in his stead, in the courtroom usually occupied by him in Room 2103 of the Federal Dirksen Building at 219 S. Dearborn, Chicago, Illinois, and then and there present **Plaintiff's Motion for Class Certification and Memorandum in Support,** a copy of which is attached.

Dated: April 22, 2004

Respectfully submitted,

By: _____
Attorney for Plaintiff

Clinton A. Krislov
Jason P. Stiehl
KRISLOV & ASSOCIATES, LTD.
20 North Wacker Drive, Suite 1350
Chicago, Illinois 60601
Tel: (312) 606-0500
Fax: (312) 606-0207
Firm ID No: 91198
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DANIELS, *et al.*,	) Case No. 03-CV-1550
Plaintiffs,	) Judge Matthew F. Kennelly
v.	)
WAYNE BURSEY, *et al*,	)
Defendants.	)

MOTION FOR CLASS CERTIFICATION

Plaintiffs, John Daniels, Manuel Sanchez, Timothy Hoffman, Diane Huntley, Joseph Bonnecorsi, Mary Obrzut, Edward Ordonez, individually, for Sanchez & Daniels Step Plan, and a class representatives for Sanchez & Daniels Step Plan Participants and other similarly-situated plans and their participants, move pursuant to Federal Rule of Civil Procedure 23, to certify the case to proceed as a class action for the following plaintiff classes:

(1) The Employer-Sponsor class: All employers/sponsors who adopted welfare plans funded in whole or part through the STEP plan and trust any time from January 1, 1992 to the present(the "Class Period"), excluding the Defendants.

(2) The Participants Class: All participants in or beneficiaries of such plans during the Class Period.

A class action is appropriate in this case because:

1. Numerosity-Fed.R.Civ.P.23(a)(1). The proposed class is so numerous that individual joinder of all members is impracticable. The Class consists of over 200 employers and 1,000 individuals and so numerous that joinder of all members as individual plaintiffs is impracticable.

2. Common Questions of Law and Fact – Fed.R.Civ.P.239a)(2). Questions of law or fact exist arising from defendants' conduct. Such questions are common to all class members and predominate over any questions affecting only individual members of the class. The myriad of questions of law or fact common to the class includes, *inter alia:*

A. ERISA and sales issues:

(i) Was the Plan a "welfare plan" described in § 419A(1)(6) of the Internal Revenue Code;

(ii) Were the contributions to the Plan actually tax deductible in accordance with law;

(iii) Were the Plan assets reachable by creditors and could monies bye easily withdrawn from the Plan;

(iv) Did the Administrative Defendants know that the Plan was not tax deductible;

(v) Did the Defendants conceal by action or inaction the significant risks that the IRS would disallow the tax deductibility of payments made to the Plan

(vi) Did the STEP Plan promoters submit marketing materials to class members falsely representing that

contributions to the Plan would be tax deductible, could not be reached by creditors, and could be easily withdrawn by Plan participants;

(vii) Was Benistar's 419 plan a welfare benefit plan for tax purposes;

(viii) Did the Administrative Defendants violate their fiduciary duties to the Plan participants

(ix) Was the STEP plan a "plan" for purposes of ERISA;

(x) Were the individual STEP arrangements adopted by employers actually employee benefit plans for purposes of ERISA;

B. Misuse and Conversion of Plan Assets:

(i) Did the Administrative Defendants use Plan assets to fund litigation challenging the IRS's determination that the Plan was not tax deductible.

(ii) Did the Administrative Defendants fail to warn Plan participants that contributions were not tax deductible after the IRS determination;

(iii) Did the Administrative Defendants discourage Plan participants from using Plan assets to buy tax-free investments;

(iv) Were the class members discouraged from purchasing term insurance, because permanent insurance brought higher commissions in the Insurance Defendants;

(v) Did the Insurance Defendants fail to allocate the Plan's insurance funds from variable accounts to safer accounts when the stock market began to decline;

(vi) Did Prudential and Murphy improperly distribute monies back to the Plan trustees when Prudential demutualized;

(vii) Did the Administrative Defendants mismanage the Plan by amending the structure without authorization;

(viii) Did the Administrative Defendants mismanage the Plan by misappropriating or looting the Plan assets;

(ix) Did the Administrative Defendants advise participants that they would lose 20% of their assets if they withdrew from the Step Plan, but only 10% if they allowed those assets to be rolled into the Benistar 419 Plan.

(x) Did the Administrative Defendants disclose to the class members that allegations of fiduciary breach made against Daniel Carpenter and his affiliates prior to causing those class members to contribute or take other actions with respect to their plan;

(xi) Did Mellon and Teplitzky breach their duty of care to the Plan participants;

(xii) Did the Defendants provide services for which they received excessive or unreasonable compensation;

(xiii) Did the Defendants engage in transactions prohibited by ERISA sec. 406;

(xiv) Did Mellon and Teplitzky act prudently and properly inquire of the suitability of the Benistar entities as fiduciaries prior to turning over plan assets;

(xv) Did Mellon properly inquire the power of Teplitzky and STEP, Inc. to appoint it as Trustee?

(xvi) Did U.S. Trust violate its fiduciary duty by failing to terminate the STEP trust in 1997?

(xvii) Did fiduciaries perpetuate the STEP Trust knowing that US Trust had not properly appointed a suitable Plan Sponsor that 70% of employers had not voted to approve STEP, Inc. as successor Plan Sponsor?

C. Issues related to Insurance

(i) Was the Plan an insurance arrangement;

(ii) Should the Insurance Companies have known that the Plan was an unlicensed insurance arrangement;

(iii) Was the STEP plan operating as an insurance arrangement in violation of the laws of insurance statues of states in which it was sold;

(iv) Did the Insurance Companies owe a fiduciary duty to the Plan participants;

(v) Did the Insurance Companies aid other fiduciaries in the breach of the latter's' duties;

(vi) Did the Defendants breach their fiduciary duties to the Plan participants;

(vii) Did the Insurance Companies and Murphy violated the Illinois Consumer Fraud Act, as well as the similar consumer protection statues in all fifty states;

(viii) Did the Insurance Companies and Murphy breach their duty of due care, good faith and fair dealing to the Plan participants;

(ix) Did the Defendants know [or should they have known] that variable life insurance policies were unsuitable for the purpose of providing severance benefits in comparison to other available investment vehicles;

D. Rico Issues:

(i) Was the STEP plan an enterprise for the purposes of 18 U.S.C. § 1961(4);

(ii) Did the Administrative Defendants and U.S. Trust "conduct" the affairs of the STEP plan;

(iii) Did the Administrative Defendants and U.S. Trust engage in a patter of racketeering;

(iv) Did Mellon engage in a RICO conspiracy;

(v) Are the class members entitled to treble damages under RICO;

E. Punitive Damages:

(i) Are the class members entitled to punitive damages.

3. Typically – Fed.R.Civ.P.23(a)(3). The claims of each class member are typical in that they arise from the same course of events conducted by the Defendants. Each class member was either a deceived employer-sponsor of a STEP plan, or a STEP plan participant or beneficiary, and conduct fully detailed and alleged in the Complaint that was done to Plan assets, similarly harmed every person with an interest in the pooled STEP Plans.

4. Adequacy of Representation – Fed.R.Civ..23(a)(4). Plaintiff will fairly and adequately protect and pursue the interests of the members of the Class. Plaintiff's proposed class counsel, Krislov & Associates, Ltd., is a well-respected and experienced law firm in the class action litigation field, with substantial expertise in ERISA and RICO cases. Plaintiff's other counsel, Koresko & Associates, P.C., are well-respected in the tax and ERISA matters at issue in this case. Neither the class representatives nor their counsel has any conflicting interests with other class members, and they vigorously represent the interest of the Class.

5. Appropriateness of a Class Action – Fed.R.Civ.P. 23(b)(1) and/or 23(b)(3). Because this case deals with the breach of a fiduciary duty of a trust and/or common fund for the members of both classes, numerous adjudications same issues may result in various outcomes, and those adjudications may result in conflicting or impeding outcomes for members of the classes. Questions of law and fact common to the class predominate over any questions affecting only

individual class members, and adjudication of these questions will produce a consistent and uniform result. Litigation of this action on a classwide basis is an appropriate method for the fair and efficient adjudication of the claims alleged herein. Class treatment is superior to other available methods for the fair and efficient adjudication of the controversy alleged herein. Allowing this action proceed as a class action will permit a large number of similarly situated persons and entities to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would inevitably require. Class action treatment will also permit the adjudication of relatively small claims of Plaintiff and other class members, who could not individually afford to litigate a complex claim against well-heeled corporate defendants such as those here in. Furthermore, even for those Class members who could afford to litigate such a claim, it would still be economically impractical, as the cost of litigation is almost certain to far exceed any recovery they might obtain.

6. Manageability. Plaintiff is unaware of any difficulty likely to be encountered in the management of this case that would preclude its maintenance as class action.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for and Order determination that this action is a proper Class action pursuant to Fed.R.Civ.P. 23 (a) and (b), certifying an appropriate plaintiff Class, and appointing Plaintiffs as Class representative and their counsel as counsel for the Class.

Dated: April 22, 2004

Respectfully submitted,

Clinton A. Krislov
Jason P. Stiehl
KRISLOV & ASSOCIATES, LTD.
Civic Opera House
20 N. Wacker, Ste. 1350
Chicago, IL 60606
(312) 606-0500

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(610) 992-2200

APPENDIX J – AMENDED MEMORANDUM AND ORDER RE: MOTION TO DISMISS, DATED APRIL 14, 2004

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK Office of the Clerk

John J. Koresko, V.
Koresko & Associates, P.C.
200 W. Fourth Street
Bridgeport, PA 19406

Case Number: 1:03-cv-01550 Other Court No: 03-L-001917

Title: Daniels v. Bursey

Assigned Judge: Honorable Matthew F. Kennelly

MINUTE ORDER of 4/14/04 by Hon. Matthew F. Kennelly: For the reasons set forth on the attached Memorandum Opinion and Order, the Court grants Prudential's motion to dismiss [124-1] except as to Count 2. The Court grants Murphy's motion to dismiss [122-1] in its entirety. the Insurance Companies' motion to dismiss is granted as to Counts 1,4,6,7 and 8 but denies it as to Counts 2 and 5. The Court grants the Administrative defendants' motion to dismiss and strike the second amended complaint [123-1,2] as to Counts, 1 and 7, denies the motion as to counts 2,3, and 8, and denies

in part and grants in part the motion as to Count 6. U.S. Trust's motion to dismiss [161-1] is granted as to Counts, 1,6,7, and 8 but denied as to Count 2. Entered Amended Memorandum Opinion and Order. Mailed notice

This docket entry was made by the Clerk on April 19, 2004

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49{c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For, scheduled events, motion practices, recent opinions and other information, visit tour web site at www.ilnd.uscourts.gov

Check our web site for CourtWeb--a concise listing of rulings by judges.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, et al., and similarly situated individuals, Plaintiffs,	)	
vs.	)	Case No. 03 C 1550
WAYNE BURSEY, et al., Defendants.	)	

AMENDED
MEMORANDUM OPINION AND ORDER[1]

MATTHEW F. KENNELLY, District Judge:

This case concerns the marketing and administration of a "severance trust executive program" (STEP) plan, a type of employee welfare benefit plan targeted to employers with highly compensated employees. John Daniels and Manuel Sanchez, along with other partners and employees of the Chicago-based Sanchez & Daniels law firm, and on behalf of a putative class of STEP Plan investors, sued Step Plan Services, Inc., its principals, and several insurance companies, alleging that the defendants violated the Employee Retirement Income Security Act (ERISA) and the Illinois Con-

[1] The Court's original ruling in this case, dated March 18, 2004, has been amended as a result of Plaintiffs' motion for reconsideration.

sumer Fraud Act and claiming fraudulent inducement and breach of fiduciary duty in connection with their actions in promoting or managing the STEP Plan. Several of the defendants filed a motion to dismiss the original complaint, which the Court granted in part and denied in part. *Daniels* v. *Bursey*, No 03 C 1550,2003 WL 22053580 (N.D. Ill. Sept. 3, 2003).

Plaintiffs amended their complaint, pleading the same claims originally filed and adding four claims asserting violations of state insurance laws and the Racketeer Influenced and Corrupt Organizations Act (RICO). Defendants Wayne Bursey, Daniel Carpenter, STEP Plan Services, Inc., Benistar Insurance Group, Inc., Mellon Trust of New York, Teplitzky & Company, Benistar 419 Plan Services, Inc., Benistar 419 Admin Services, Inc., Benistar 419 Plan, Benistar Employer Services Trust Corp., and Benistar, Ltd. (collectively referred to as "Administrative" Defendants"); U.S. Trust; National Life Insurance Co., Allmerica Financial Benefit Insurance Co. .New York Life Insurance Co., Metropolitan Life Insurance Co., and Hartford Life Insurance Co. (collectively referred to as "the Insurance Companies"); Prudential Insurance Co. of America; and Thomas Murphy have each moved to dismiss Plaintiffs' second amended complaint. For the reasons stated below, the Court grants the motions in part and denies them in part.

Factual Background

For purposes of considering the five motions to dismiss before us, the Court accepts as true plaintiffs' well-pleaded factual allegations. *Thompson* v. *Illinois Dept. of Profes-*

sional Regulation, 300 F.3d 750, 753 (7111 Cir. 2002). Sanchez & Daniels is a Chicago law firm. In 1995 it adopted a STEP Plan, a type of employee benefit plan that Plaintiffs allege, at least in the alternative, is governed by ERISA. 2d Amended Compl ¶¶ 139-40. In 1998 approximately 255 employers participated in the STEP Plan[2] *Id.*¶ 90. The STEP Plan was administered by the Administrative Defendants and U.S. Trust. *Id.* ¶¶ 163-65. The Plan was devised as "a vehicle for employers to allegedly purchase life insurance on a tax deductible basis," *id.* , 83, and was "designed to provide Participants with (1) death benefits, (2) disability benefits, and (3) severance benefits." *Id.* , 86. A substantial amount of the Plan's assets were variable insurance policies issued and administered by the Insurance Companies and Prudential. *Id.*' 68. Plaintiffs allege the Insurance Companies managed these policies negligently or with willful disregard, resulting in losses to the STEP Plan. *Id.* , 74.

Sanchez & Daniels and its partners and employees allege that the Plan's promoters fraudulently induced them - through marketing materials and an opinion letter from a lawyer – to adopt the STEP Plan by falsely representing that contributions to the Plan would be tax deductible, could not be reached by creditors and could easily be withdrawn by Plan participants. *Id.*¶¶ 96-97, 100, 112-17,123-24, 144, 146. According to Plaintiffs, the Plan was not tax deductible, the

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[2] Plaintiffs state that each employer participant had its own plan; Defendants state that all the employers participated in one plan. For purposes ofthe motions to dismiss, the Court will refer to the STEP Plan as a single, multi-participant plan.

Plan's assets were not protected from creditors and participants could not easily make withdrawals from the Plan. *Id.* ¶¶ 132-33, 139-41, 145, 147, 272-75. The Plan promoters knew the IRS had found that contributions to the STEP Plan made by a Plan participant were not tax deductible, *Id.* ~ 272-75, and the Administrative Defendants used assets from the Plan to find litigation challenging the IRS's determination that contributions to the STEP Plan were not tax deductible. *Id.*¶ 278. The case ended in stipulations by the parties that 75 percent of the contributions to the STEP Plan for the years in question were not deductible, that fines would be assessed, and that employee participants in the Plan would be assessed with additional taxable income, penalties and interest. *Id.* ¶279. The IRS issued proposed regulations on July 11,2002, stating that contributions to the STEP Plan were not tax deductible because the Plan did not qualify for deductions under Section 419A(f)(6) of the Internal Revenue Code. *Id.* 288. However, the Administrative Defendants never warned the Plan participants, such as Sanchez & Daniels, that the contributions were not deductible. *Id.* ¶¶ 282-87. Plaintiffs allege that they any other employers participated in the STEP Plan primarily for the promised tax advantages, and that if they had known of the IRS's ruling, they would have withdrawn from the Plan. *Id.*¶¶ 284 86.

Plaintiffs argue the Insurance Companies not only marketed the STEP Plans long after learning their benefits were dubious, *id.* ¶¶ 132-33, 148,281-83, they also discouraged Plan participants from using Plan assets to buy annuities, municipal bonds, other tax-free investments, or term insurance in lieu of permanent insurance, which yielded higher

commissions to the Insurance Companies and their agents than did other types of investments. *Id.* ¶¶ 149-55,243-52. Plaintiffs further allege that when the stock market began to decline, the Insurance Companies failed to allocate the Plan's insurance funds from variable accounts to safer accounts, resulting in substantial losses to the value of the Plan. *Id.* ¶¶ 253-55.

Plaintiffs further allege that because the STEP Plan purported to provide unemployment and insurance benefits to those participants who paid a premium for the benefits, the Plan constituted an insurance arrangement. *Id.* ¶161-64. Plaintiffs allege the Plan operated as an unlicensed insurance company in violation of state insurance codes. *Id.* ¶170-71. Plaintiffs claim the Insurance Companies should have known they were promoting operations of an unlicensed insurance carrier. *Id.* ¶¶ 256-57. Plaintiffs' final allegation against the Insurance Companies is that when Prudential demutualized,[3] Prudential and Murphy allowed the proceeds that were paid to holders of its insurance policies to be distributed to the Plan's Trustees (the Administrative Defendants) without ensuring that the funds were actually credited to the Plan. *Id.* ¶¶ 264-71. Plaintiffs characterize this alleged lack of oversight as negligent and claim that Prudential and Murphy are responsible for allowing the Plan fiduciaries to loot the demutualization proceeds. *Id.*

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[3] In 2001 Prudential demutualized, meaning it changed from being owned by policyholders to being owned by shareholders. The demutualiztion process required Prudential to distribute stock to certain policy owners, including the Trustee of the STEP Plans.

Plaintiffs further allege that the Plan's fiduciaries, which Plaintiffs identify as the Administrative Defendants, mismanaged the Plan, amending its structure without authorization and misappropriating or looting its assets. *Id.*¶¶ 63-64, 177-92. Plaintiffs allege that when control of the STEP Plan was assumed by Benistar, Plaintiffs were not informed that a Massachusetts jury had found that a Benistar affiliate and its principal Carpenter had breached their fiduciary duties, converted property of a trust and made intentional misrepresentations. *Id* ¶¶ 225, 227. Carpenter had used money held by the Benistar Entities in trust to engage in risky options trading. *Id.* ¶ 235(g). On September 23,2003, a Massachusetts Superior Court judge awarded the plaintiffs in that case $25,952,450. *Id.* 1226, 228. The judge pierced the corporate veil, holding the Benistar Entities liable for the entire judgment.[4] *Id.* ¶ 236-37 In addition to administrating the STEP Plan, Benistar also operated the Benistar 419 Plan, which it marketed as a Section 419A(f)(6) arrangement funded with life insurance policies. *Id.*¶ 196. Plaintiffs allege that the Administrative Defendants knew the Bemstar 419 Plan did not comply with Section 419A(f)(6), because the IRS proposed regulations and issued a private ruling saying such, and two Tax Court decisions held that the Benistar 419 Plan is not a welfare benefit plan for tax purposes. *Id.*¶¶198-99.

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[4] The Administrative Defendants argue that the paragraphs of the second amended complaint (11 225-42) describing the Massachusetts litigation "should be stricken as immaterial, impertinent, and scandalous matter." Admin. Defs. Mot. at 2. The request is denied, but we reserve for a later date the question of whether evidence regarding the Massachusetts action is admissible.

Plaintiffs assert that when they tried to remove their assets from the STEP Plan in 2001, the Administrative Defendants advised them that they - and all other participants in the STEP Plan - would lose 20 percent of their assets in the Plan if they withdrew outright but would lose only 10 percent if they rolled their STEP Plan assets into the 419 Plan being marketed by Benistar. *Id.* ¶¶ 200, 205. According to Plaintiffs, the Administrative Defendants would benefit not only from the 10 to 20 percent assessment, but also from insurance commissions and administrative fees they would derive if the employers opted to transfer their assets into the 419 Plan. *Id.* ¶¶ 209.;13. Sanchez & Daniels refused to accept either alternative. *Id.* ¶216. Plaintiffs allege that in retaliation for the law firm's demand that its Plan assets be transferred to a plan other than the 419 Plan, the Administrative Defendants sued Sanchez & Daniels for defamation. *Id.* ¶ 218. Sanchez & Daniels further alleges that the Administrative Defendants "threatened to dissipate the assets attributable to [Sanchez & Daniels'] employees, and to discriminate against [them] as of December 2,2002." *Id.* ¶ 220. Plaintiffs claim similar threats were made to other employers who questioned the Administrative Defendants handling of the Plan. *Id.* ¶ 221. They allege that other STEP Plan participants would not have agreed to rollover their assets to the 419 Plan had they known of the outcome of the Massachusetts litigation. *Id.* ¶ 242.

Analysis

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, the Court reads the complaint liberally, granting the motion only if "it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conely* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). That means we must take all statements of fact in the complaint as true and must draw reasonable inferences in favor of Plaintiffs. *Dixon* v. *Page*, 291 F.3d485, 486-87 (7th Cir. 2002) (citing *Massey* v. *Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000)). Generally speaking, plaintiffs "need not set out in detail all of the facts upon which they base their claim." *Boim* v. *Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, 291 F.3d 1000, 1008 (7th Cir. 2002) (citing Fed. R. Civ. P.8(a)). "Rule 8(a) requires only that the complaint give the defendants fair notice of what their claim is and the grounds upon which it rests." *Id.* (citing *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit;* 507 U.S. 163, 168 (1993)).

However, the pleading requirements are different when a plaintiff alleges fraud. Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). This particularity requirement applies to claims under the Illinois Consumer Fraud and Deceptive Business Practices Act, *Petri* v. *Gatlin*, 997 F~ Sapp. 956,973 (N.D. Ill. 1997), and to claims of mail and wire fraud alleged as examples of racketeering activity under RICO. *Slaney* v. *Int'l Amateur Athletic Federation*, 244 F.3d 580, 597 (7th Cir. 2001). "Although states of mind may be pleaded generally," to satisfy Rule 9(b), "the circumstances must be pleaded in detail. This means the who, what, when, where,

and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624,627 (7th Cir. 1990). When alleging the who, what, when, where and how, a plaintiff may hot lump the defendants together in a group; rather, the plaintiff must specify each defendant's participation in the alleged fraud. *See Viacom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 778 (7th Cir. 1994).

These strict pleading requirements are not without exceptions. The Seventh Circuit has recognized that "the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim." *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1051 (~Cir. 1998); *Emery v. American General Finance, Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998) ("We don't want to create a Catch-22 situation in which a complaint is dismissed because of the plaintiffs inability to obtain essential information without pretrial discovery (normally of the defendant, because the essential information is in his possession and he will not reveal it voluntarily) that she could not conduct before filing the complaint."). But the particularity requirement cannot be relaxed too much: "[t]he purpose (the defensible purpose, anyway) of the heightened pleading requirement in fraud cases is to force the plaintiff to do more than the usual investigation before filing his complaint." *Ackerman* v. *Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 469(7th Cir. 1999). "By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory

and extortionate." *Id.* We review Plaintiffs' second amended complaint in light of these standards.

Before the Court addresses Defendants' claim-specific arguments, we will deal with several overarching arguments the Administrative Defendants make as to why they as a group and as individuals should be dismissed from the second amended complaint. First, they argue that the Benistar entities named for the first time in the second amended complaint should be dismissed from the suit, claiming that Plaintiffs raised no allegations of wrongdoing by the Benistar 419 Plan and the other newly named entities. The Court disagrees. The second amended complaint articulates a theory of how the newly named Benistar entities are culpable for the alleged misdeeds of the previously named Administrative Defendants. Plaintiffs allege that all the Benistar entities are controlled by Carpenter, 2d Amended Compl. , 201, and that Benistar offered disadvantageous terms for withdrawing from the STEP Plan so that Plaintiffs would rollover their assets into the Benistar419 Plan. *Id.* ¶ 204-42. Plaintiffs are alleging that the previously named Benistar entities were acting either at the behest or for the benefit of Carpenter and the newly named Benistar entities that Carpenter controlled. Plaintiffs' allegations sufficiently link the newly named Benistar entities to the other Administrative Defendants to include them as defendants.

Second, the Administrative Defendants argue that Sanchez & Daniels lacks standing to complain of much of the behavior described in the second amended complaint because it occurred after the firm withdrew from the Plan. Plaintiffs allege that when they attempted to withdraw from the Plan,

Benistar informed them that by doing so they had forfeited to Benistar the assets in the Plan. *Id.* 218. Because Plaintiffs dispute Benistar's right to withhold its assets, there is an issue of fact as to whether Sanchez & Daniels continued to have an interest in Benistar's management of the retained funds. Furthermore, the Administrative Defendants concede that even after Plaintiffs froze their Plan benefits, Sanchez & Daniels employees would be entitled to severance benefits whenever a severance event occurred. Admin. Defs. Mem. Ex.2. Therefore, even under the Administrative Defendants' logic, Sanchez & Daniels would have an interest in the management of the Plan until all employees received severance benefits, which, the Administrative Defendants state, never occurred. Thus Sanchez & Daniels has standing to challenge the Benistar Entities actions regarding the Plan.

Similarly, the Court rejects the Administrative Defendants' argument that because no severance event has occurred; Sanchez & Daniels has not been denied a severance benefit and, therefore, any claims arising from Benistar's takeover of the administration of the Plan and subsequent looting are unripe. Plaintiffs allege that they should have been able to transfer all their assets from the STEP Plan to another trust, rendering the ongoing denial of that request an injury that is ripe for potential redress. We now turn to the profusion of count-specific reasons offered by Defendants for dismissing the second amended complaint.

1. Count 1

Count 1 alleges a claim not made in previous versions of the complaint. Plaintiffs claim that Defendants violated the

insurance laws of all fifty states. But, as Murphy points out, Plaintiffs fail to identify in the second amended complaint which insurance laws have been broken. Defendants construe Plaintiffs' allegations in Count 1 as accusing Defendants of operating an unauthorized insurance arrangement in violation of state provisions requiring insurance companies to be licensed. Positing that only the Insurance Code of Illinois applies to Plaintiffs' claims, the Insurance Companies argue that Count 1 should be dismissed because the Illinois Insurance Code does not provide a private right of action to sue an insurance company for operating without a license. Plaintiffs respond by pointing to two provisions of the Illinois Insurance Code that provide a private right of action. For the reasons stated below, Plaintiffs response does not salvage this vague claim.

For Count 1 to survive, Plaintiffs have to identify which insurance provisions they allege were violated by Defendants; they are not entitled to fling the entirety of fifty states' insurance codes against the wall in the hope that some unnamed provision will stick. Murphy states in his reply brief that Plaintiffs must do so in the text of the complaint, arguing any elaboration made in Plaintiffs' response brief "does not cure the defect in the Complaint." Murphy Reply at 2. But that is not the rule in the Seventh Circuit. "A complaint must narrate a *claim*, which means grievance such as 'the City violated my rights by preventing me from renovating my apartments. Having specified the wrong done to him, a plaintiff may substitute one legal theory for another without altering the complaint." *Albiero* v. *City of Kankakee*, 122 F.3d 417,419 (7th Cir. 1997) (emphasis in original). Simi

larly, "a plaintiff may supplement the complaint with factual narration in an affidavit or brief" *Id.* (citing *Early* v. *Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (7th Cir. 1992) and *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909,914-15 (7th Cir. 1985)). In this context, that means that Plaintiffs can use their response briefs to identify the specific statutory provisions they claim were violated.[5] We now consider whether they have sufficiently done so.

The only statutory provisions Plaintiffs cite are provisions in the Illinois Insurance Code.[6] Plaintiffs are correct that "[i]t is unlawful for any insurer to transact insurance business in [Illinois] without a certificate of authority from the Director." 215 ILCS 5/121-2. But Defendants accurately point out that only the Director of Insurance can enforce this provision:

> Whenever the Director believes, from evidence satisfactory to him that any insurer is violating or about to violate Section 121-2 of this Act, the Director may, through the Illinois Attorney General, cause a complaint to be filed in the Circuit Court of Cook County, or the Circuit Court of Sangamon County, to enjoin and restrain that insurer from continuing such violation or engaging therein or

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[5] The obvious exception to this is Rule 9(b). But Count 1 does not allege fraud, so Rule 9(b) does not apply

[6] In a footnote, Plaintiffs cite a Pennsylvania case that they say relied on a Pennsylvania provision analogous to 215 ILCS 5/121-4. But they do not cite the statute

> doing any act in furtherance thereof. The court shall have jurisdiction of the proceeding. and may make and enter an order Of judgment awarding such preliminary or final injunctive relief as, in its judgment, is proper.

Id. § 121-5. Furthermore, any fines assessed for transacting insurance business without a license are recovered in the name of the People of the State of Illinois. *!d.* § 121(3). We found no case in which a private plaintiff has been permitted to sue under section 121-2. We agree with Defendants that Plaintiffs cannot sue Defendants under 215 ILCS 5/121 for operating an insurance business without a license, because there is no private right of action. *See Hamilton v. Safeway Insurance Co.*, 104 Ill. App. 3d 353, 356,432 N.E. 2d 996,999 (1982) (finding that statute providing that the Director of Insurance shall take action against a company engaging in improper claims practices implies there is no private right of action for improper claims practices).

In their response brief, Plaintiffs point to two provisions of the Illinois Insurance Code that they claim specify remedies available to victims. One of the provisions states, in relevant part:

> If any such unauthorized insurer fails to pay any claim or loss within the provisions of such an insurance contract, any person who assisted or in any manner aided directly or indirectly in the procurement of the insurance contract shall be liable to the insured for the full amount of the claim or loss as provided in that insurance contract.

215 JLCS 5/121-4. The second provision states:

> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount-of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed anyone of the following amounts:
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> (a) 25% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $25,000;
>
> (c) the excess of the amount which the court or jury find such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

215 ILCS 5/155.

These provisions specify remedies available to victims, but they do not impose substantive limitations on the conduct of insurers. They specify who can be sued and the remedies available when an insurance company fails to pay a claim, but a plaintiff relying on these provisions sues the insurance company for failing to pay a claim, not for violating the Illi-

nois Insurance Code. Plaintiffs are not claiming that Defendants failed to pay a claim made' under the STEP Plan; they are alleging that they were defrauded into adopting the STEP Plan and that they should have been able to withdraw their assets from the Plan. The Administrative Defendants' refusal to allow Plaintiffs to withdraw their funds does not constitute a denial of a claim or liability as the sections use those terms. The Court therefore dismisses Count 1.

2. Counts 2 - 4

Plaintiffs allege in Count 2 that the Administrative Defendants and the Insurance Companies violated ERISA and breached the common law fiduciary duty they allegedly owed Plaintiffs; Count 3 alleges that Mellon Trust of New York and Teplitzky & Co. violated a common law duty of care owed to Plaintiffs; and Count 4 alleges Murphy and the Insurance Companies violated a duty of care, good faith and fair dealing owed to Plaintiffs. These three claims appeared in Plaintiffs' original complaint as Counts. 1 through 3.

Because Count 4 raises essentially the same allegations that we dismissed when they appeared in Count 3 of the original complaint, we will consider it first. In Count 3 of the original complaint, Plaintiffs alleged that Prudential and Murphy breached a common law duty of care owed to Plaintiffs by failing to ensure that the Prudential demutualization proceeds owed to the Plan were actually paid to the Plan instead of pocketed by the Administrative Defendants; Count 4 of the Second Amended Complaint alleges that the Insurance Companies and Murphy breached the common law duty of care owed to Plan participants other than Sanchez & Daniels

by failing to ensure that Prudential demutualization proceeds owed to the Plan were actually paid to the Plan instead of pocketed by the Administrative Defendants. We dismissed Count 3 of the original complaint because it "d[id] not state a claim for breach of fiduciary duty, but rather appears to assert a novel claim based on an insurance company's alleged duty to monitor the financial dealings of its policyholders." *Daniels*, 2003 WL 22053580, at *2. Plaintiffs have done nothing to persuade the Court that this ruling was wrong. Count 4 of the Second Amended Complaint is therefore dismissed.

In Count 2, Plaintiffs offer a different theory for why the Insurance Companies owed Plaintiffs a fiduciary duty. Plaintiffs allege the Insurance Companies were fiduciaries because they had discretionary control over the variable life insurance policies held by the Plan. 2d Amended Compl. ¶ 303. Plaintiffs allege the Insurance Companies violated their fiduciary duties "by improperly investing the plan assets in variable contracts and then not properly monitoring the investments and diversifying when the markets began to plummet." *Id.*" 305. Plaintiffs also make allegations that we rejected with regard to Count 3 (formerly Count 4), namely that the Insurance Companies breached their fiduciary duty by failing to safeguard the assets managed by the Administrative Defendants. *Id.* -U-U 306-07. We will not revisit our determination that the Insurance Companies did not have a duty to assure that the Administrative Defendants fulfilled their fiduciary duties. We will, however, consider Plaintiffs' contention that Defendants had fiduciary duties related to their management of the insurance policies held by the Plan.

Plaintiffs cannot state a claim under ERISA against the Insurance Companies for breach of fiduciary duty unless they were in fact fiduciaries. *Plumb* v. *Fluid Pump Service, Inc., 124* F.3d 849,854 (7th Cir. 1997) (citing *Klosterman v. Western .Gen. Management, Inc.,* 32 F.3d 1119, 1122 (7th Cir. 1994)). ERISA identifies three types of duties that characterize a fiduciary: a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility inthe administration of such plan.

29 U.S.C.A. § 1002(21)(A). Because fiduciary status depends on the extent to which the person performs certain tasks,. "a person may be an ERISA fiduciary for some purposes, but not for others." *Plumb,* 124 F.3d at 854 (citations omitted). Plaintiffs allege the Insurance Companies and Murphy breached their fiduciary duties by investing Plan assets in variable insurance policies and not diversifying the investments when the market shifted. 2d Amended Compl. ¶305. Thus they can state a claim only if the Insurance Companies had fiduciary duties with respect to the management of the insurance policies. *See id.* at 854 (citing *Coleman* v. *Nationwide Life Insurance Co.,* 969 F.2d 54,61 (4th Cir. 1992)). The Insurance Companies argue that the Plan documents attached to the original complaint as exhibit A make

clear that the Insurance Companies did not owe Plaintiffs a fiduciary duty with regards to the policies. It is appropriate for the Court to consider the Plan documents when confronted with a motion to dismiss a claim of breach of fiduciary duty, so we will do so. *See id.* at 854-55 (analyzing the plan documents to determine whether the district court properly dismissed claim).

The Seventh Circuit has noted that "an insurer generally will not be held to be a fiduciary with respect to an activity unless the plan documents show that the insurer was responsible for that activity." *Id.at* 854 (citing *Coleman,* 969 F.2d at 61). Defendants argue that the Plan documents state explicitly that the Insurance Companies had no discretion with respect to the investment of Plan assets in variable insurance policies. The Plan documents state that "the Trustee will. . . invest the assets of the Trust, including all Employer contributions. . . invariable life insurance contracts funded exclusively through the Conservatively Managed Flexible subaccount of the Prudential Variable Appreciable Account of the Insurer." Compl. Ex. A, § 5. 1 (a). In addition, Section 9.4 of the Plan states that the "Trustee shall. . . invest Fund assets in life insurance contracts provided by the Insurer in accordance with Section 5.1 of the Plan." Thus, the Plan documents make it clear that the Insurance Companies had no discretionary authority or control over whether the Plan assets were invested in variable insurance policies.

The Insurance Companies also correctly point out that they did not have "discretionary control over how the funds within the insurance policies were allocated." Ins. Co. Me~. at 16. The Plan documents specified that "[t]he Trustee shall

have full and complete control over any life insurance policy acquired" by the Trust. Compl. Ex. A, § 5 .1 (b). The Plan documents, like those in *Plumb*, specified that the Insurance Companies would only play an administrative and explicitly non-discretionary role: "It is understood by the parties hereto that while the Insurer will perform certain administrative functions with respect to the insurance policies, such duties do not involve the exercise of any discretionary authority or other authority to manage and control assets of the Trust." *Id.* § 9.12. To make the point even more clearly, the Plan documents state that "[i]n no event shall the Insurer be a fiduciary of the Plan. ", *Id.* § 13 .10. In sum, the Plan documents defeat 'Plaintiffs' allegation that the Insurance Companies had fiduciary duties with respect to the investment in variable insurance policies and the management of the funds within those policies.

Although the heading for Count 2 alleges that the named defendants have breached fiduciary duties under both ERISA and the common law, Plaintiffs have failed to argue in their response to the Insurance Companies' motions to dismiss that the Insurance Companies had a common law fiduciary duty. They do argue in the alternative that even if the Insurance Companies are not ERISA fiduciaries, they should be held liable under § 502(a)(3) for aiding and abetting the Administrative Defendants' breach of their fiduciary duties. 2d Amended Compl. ¶ 308. The Seventh Circuit has stated reluctantly that nonfiduciaries cannot be held liable. Under ERISA for knowing participation in a fiduciary's misconduct. *Reich* v. *Continental Casualty Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (relying on dicta in *Mertens v. Hewitt Asso-*

ciates, 508 U.S. 248, 113 S. Ct. 2063, 124 L.Ed.2d 161 (1993) that applied "a strict constructionist's approach" that the Seventh Circuit "might not embrace as an original matter"). However, in *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 120 S. Ct. 2180, 147 L.Ed.2d 187 (2000), the Supreme Court reinterpreted the dictum from *Mertens* relied upon by the Seventh Circuit in *Continental Casualty*, effectively abrogating *Continental Casualty* itself.

In *Harris* the Supreme Court considered whether §502(a)(3) of ERISA, codified at 29 D.S.C. § 1 132(a)(3), provided a cause of action against a nonfiduciary "party in interest" to a transaction barred by § 406(a), which prohibits a plan fiduciary from engaging in a transaction with a party in interest. *See* 29 D.S.C. § 1106(a). The case originated in the Seventh Circuit, which relied on the same dictum from *Mertens* that it relied upon in *Continental Casualty* and concluded that "a nonfiduciary cannot be liable under § 502(a)(3) for participating in a § 406 transaction." *Harris*, 530 U.S. at 244. The Supreme Court reversed.

The Court recognized that § 406(a) of ERISA imposed a duty only on a fiduciary. *Id.* at 245 (citing 29 D.S.C. § 1106(a)(1)). But the Court rejected "the Seventh Circuit's and Salomon's conclusion that, absent a substantive provision of ERISA expressly imposing a duty upon a nonfiduciary party in interest, the nonfiduciary party may not be held liable under § 502(a)(3), one of ERISA's remedial provisions." *Id.* . The Court stated "that § 502(a)(3) itself imposes certain duties, and therefore. . . liability under[§ 502(a)(3)] does not depend on whether ERISA's substantive provisions

impose a specific duty on the party being sued." *Id.* (footnote omitted).

In arriving at this conclusion, the Court noted that "§ 502(a)(3) admits of no limit. . . on the universe of possible defendants." *Id.* at 246. The Court looked to § 502(!), another remedial provision of ERISA, to define the scope of § 502(a)(3). Section 502(!) states in relevant part that:

> (I) In the case of
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> (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
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> (B) any knowing participation in such a breach or violation by any other person, .the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

29 D.S.C. § *1132(1)(1).* The Court stated that "[t]he plain implication is that the Secretary may bring a civil action under § 502(a)(5) against an 'other person' who 'knowing[ly]participat[es]' in a fiduciary's violation." *Harris,* 530 U.S. at 248. The Court noted that "[t]his § 502(a)(5) action is available notwithstanding the absence of any ERISA provision explicitly imposing a duty upon an 'other person' not to engage in such 'knowing participation. m *Id.* The Court reasoned that "if the Secretary may bring suit against an 'other person' under subsection (a)(5), it follows that a participant, beneficiary, or fiduciary may bring suit against an 'other person' under the similarly worded subsection (a)(3)." *Id.*at

248-49 "(citing *Mertens*, 508 U.S. at 260). The Court found that § *502(1)* "compels the conclusion that defendant status under § 502(a)(3) may arise from duties imposed by § 502(a)(3) itself, and hence does not turn on whether the defendant is expressly subject to a duty under one of ERISA's substantive provisions." *Id.* at 247.

The Supreme Court's meaning is clear: § 502(a)(3) (or (a)(5)) liability does not hinge "on whether the particular defendant labors under a duty expressly imposed by the substantive provisions of ERISA Title L" *id.* at 249, rather it hinges on whether he knowingly participated in a fiduciary' s breach of a substantive provision of ERISA. Thus even though the Court has concluded that the Insurance Companies were not themselves fiduciaries, the Plaintiffs can still seek equitable relief under § 502(a)(3) against them for "knowing participation" in a breach of fiduciary duty by the Administrative Defendants.

The Insurance Companies read *Harris* more narrowly, insisting that it applies only to 'claims brought against a nonfiduciary party in interest for violations of § 406 and that the Insurance Companies are not parties in interest. The Court disagrees with this narrow reading of *Harris*. In *Harris* the Supreme Court interpreted § 502(a)(3), not § 406, and accordingly it governs any suit under § 502(a)(3) alleging a violation of any substantive provision of ERISA. The Court also disagrees with the Insurance Companies' claim that because § 405(a) - the so called aiding and abetting statute - imposes a duty only on fiduciaries, Plaintiffs cannot sue the Insurance Companies under § 502(a)(3) for aiding and abetting the Administrative Defendants' breaches of fiduciary

duty. . *Harris* makes clear that a nonfiduciary does not have to labor under a duty imposed by a substantive provision of ERISA to be sued under § 502(a)(3). Section 406, like § 405(a); imposed a duty only on fiduciaries, yet the Supreme Court specifically stated that liability under § 502(a)(3) did not depend on whether the defendant had a duty under § 406. *Id.* at 249. In short, to plead a claim against a nonfiduciary under § 502(a)(3), the plaintiff need not allege that the nonfiduciary himself violated a substantive provision of ERISA. Rather, the plaintiff must allege only that a fiduciary violated a substantive provision of ERISA and the nonfiduciary knowingly participated in the conduct that constituted the violation. Under *Harris* a claim under § 502(a)(3) against a nonfiduciary essentially-asserts that the nonfiduciary aided and abetted the fiduciary's breach - the plaintiff need not plead a violation of § 405(a) to reach the conduct.

To state a claim under § 502(a)(3) against the Insurance Companies, Plaintiffs must allege that (1) the Administrative Defendants violated a substantive provision of ERISA and (2) the Insurance. Companies knowingly participated in the prohibited conduct. Plaintiffs have alleged that the Administrative Defendants violated § 409 by breaching the fiduciary duty owed to Plan participants. 2d Amended Compl. ¶ 369. The Administrative Defendants -like the Insurance Companies before them - argue that they were not fiduciaries. However, the Plan documents quoted above make clear that the Administrative Defendants - including Teplitzky, the former Plan administrator, and Mellon, the trustee - were fiduciaries under ERISA; they had the discretion and authority to manage the assets in the Plan. This has two implications for the

proceedings before us: the Administrative Defendants' motion to dismiss Counts 2 and 3 must be denied, and Plaintiffs have alleged the first element necessary to state a Claim under § 502(a)(3) against a nonfiduciary.

Putting aside for a moment the Administrative Defendants' arguments for why Counts 2 and 3 should be dismissed even if they are fiduciaries, the Court will finish the analysis of whether Plaintiffs have stated a claim against the Insurance Companies under § 502(a)(3). Because Plaintiffs have stated a claim against the Administrative Defendants for a breach of fiduciary duty, the only question remaining is whether Plaintiffs have alleged that the Insurance Companies knowingly participated in the Administrative Defendants' breaches. In Count 2, Plaintiffs allege that the Insurance Companies, along with the Administrative Defendants, mismanaged the investment of Plan assets. *Id.*¶ 305,364. As discussed above, the Plan documents state that the Administrative Defendants and not the Insurance Companies had discretionary authority regarding the insurance policies. However, the fact that the Insurance Companies were not fiduciaries with regards to the Plan assets does not necessarily mean their handling of the insurance polices held by the Plan was passive or benign. Plaintiffs' allegations that the Insurance Companies mismanaged the Plan's investments, liberally construed as required on a motion to dismiss, amounts to an allegation that the Insurance Companies knowingly participated in conduct that constituted a breach of fiduciary duty by those who controlled the Plan assets - that is, the Administrative Defendants. Plaintiffs have therefore stated a claim against the Insurance Companies under §

502(a)(3). Accordingly, the Court denies the Insurance Companies' motion to dismiss Count 2.

The Administrative Defendants argue that Count 2 should be dismissed because the partners of Sanchez & Daniels lack standing to sue under ERISA. Under ERISA, federal district courts have "exclusive jurisdiction of civil actions. . . brought by the Secretary or by a participant, beneficiary, or fiduciary." 29 D.S.C. § 1132(e)(1). Relying on *Giardono* v. *Jones*, 867 F.2d 409,411-13 (7th Cir. 1989), the Administrative Defendants argue Sanchez & Daniels and its partners cannot sue under ERISA because they are not plan participants. The Seventh Circuit stated in *Giardono* that an employer could not sue as a participant. *Giardono*, 867 F.2d at 411-12. A little more than a month ago, however (after briefing on the present motions was completed), the Supreme Court abrogated *Giardono*, making clear that employer-partners like Sanchez, Daniels and the other partners ofthe firm qualify as participants under ERISA. *Yates* v. *Hendon*, 124 S.Ct. 1330, 1335 (2004).

> If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. Such a working owner, in common with other employees, qualifies for the protections ERISA affords plan participants and is governed by the rights and remedies ERISA specifies.

Id. The Supreme Court made clear that it was rejecting the position taken by lower courts, including the Seventh Circuit

in *Giardomo*, "that a business owner may rank only as an 'employer' and not also as an 'employee' for purposes of ERISA-sheltered plan participation;" *Id.* Therefore, the partners of Sanchez & Daniels and the similarly-situated employers who are potential class members have standing to sue the Administrative Defendants for breach of fiduciary duty. In addition to arguing the partners of Sanchez & Daniels cannot sue under ERISA as participants, the Administrative Defendants argue that they cannot sue under ERISA as beneficiaries either because when they withdrew from the Plan they forfeited their status as beneficiaries. We need not consider whether the partners of Sanchez & Daniels have standing to sue under ERISA as beneficiaries because we have found that the partners can sue under ERISA as participants and, therefore, do not need an alternative capacity in which to sue. U.S. Trust argues that it should be dismissed from Count 2 because Plaintiffs' claims against it are time-barred. Specifically, it argues that Plaintiffs had notice of the alterations made to the Plan documents by U.S. Trust when a copy of the amended documents was sent to Plaintiffs in 1997, and that Plaintiffs had three years from that time to bring a claim for breach of fiduciary duty under ERISA. U.S. Trust Mem. at 3 (citing 29 U.S.C. § 1113). But Plaintiffs' claim against U.S. Trust is based on more than just the amendment of the Plan documents. Plaintiffs also allege that U.S. Trust breached its duty to inform Plaintiffs that contributions to the Plan were not tax deductible, 2d Amended Compl. 1308, and its duty to avoid conflicts of interest. *Id.* 1310. When Plaintiffs learned of these alleged breaches is an issue of fact not appropriate for determination on a motion to

dismiss. Therefore, we deny U.S. Trust's motion to dismiss Count 2.

3.Count 5

In Count 5 Plaintiffs allege, as they did in Count 4 of the original complaint, that Murphy, Prudential and the other Insurance Companies violated the Consumer Fraud and Deceptive Business Practices Act. To state a claim under the Act, the plaintiff must allege "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Oliveira* v. *Amoco Oil Co.*, 201 Ill. 2d 134, 149, 776 N.E.2d 151, 160 (2002). Plaintiffs claim that Prudential and Murphy made false and misleading statements in marketing materials regarding the tax and ERISA status of the STEP Plan and that Sanchez & Daniels adopted the Plan in reliance on these misstatements. Plaintiffs allege on behalf of the putative class that the Insurance Companies made the same misstatements in marketing materials relied upon by the class in choosing to invest in the STEP Plan.

Prudential and Murphy sought to dismiss the count when it appeared as Count 4 in the original complaint, arguing that it failed to allege fraud with the specificity required by Rule 9(b). We agreed and dismissed the claim with leave to amend. Plaintiffs did so and renumbered the claim as Count 5. The Insurance Companies - but not Prudential or Murphy - argue that the claim as amended still does not meet the requirements of Rule 9(b). The Court disagrees.

In Count 5, Plaintiffs clearly articulate the who, what, where, when and how of Hartford's alleged commission of fraud. Plaintiffs allege that from August 11 through 19, 1996, Hartford sponsored a booth at a convention at The Sagamore Hotel in upstate New York, where its agents distributed to convention attendees materials marketing contributions to the STEP Plan as tax deductible, even though Hartford knew or should have known that was not true. 2d Amended Compl. ¶¶ 407,423. Furthermore, Plaintiffs allege that on February 20, 2001, Hartford sent a letter to Plan participant Michael Bearb stating that Plan assets could not be collected by creditors, even though they could be. *Id.* ¶¶ 414-15. Thus Plaintiffs have met the particularity requirements of Rule 9(b) with regard to Hartford.

Plaintiffs allege that the Insurance Companies distributed marketing materials to the employers who had adopted STEP Plans falsely stating that contributions to such Plans were tax deductible. Plaintiffs have attached to their complaint a list prepared by STEP Inc. in 1998 for tax purposes naming the 255 employers who adopted the Plans and the insurance companies whose policies were purchased by those employers. 2d Amended Compl. ¶90 (referring to Ex. E of original complaint). They further allege that the Insurance Companies produced and distributed to each of those employers "plan sponsor binders" that promoted the tax deductible status of contributions to the Plan and stated that the Plan was fully insured even though the Insurance Companies purportedly knew neither statement was true. *Id.* ¶ 432. The locations where the marketing materials were distributed can be assumed to be the places of business of the Plan partici-

pants identified on the STEP Plan's tax returns (referred to by Plaintiffs as the Plan's Form 5500 disclosures). Thus Plaintiffs have specified the who, what, where and how of the alleged fraud.

Plaintiffs have not specified exactly when each of these fraudulent misrepresentations occurred, stating only that the statements occurred "during the relevant time period," which Plaintiffs identify in their response brief as 1990 to the present. Pl.'s Resp. to Ins. Cos.' Mot. at 16. Under the present circumstances, this is sufficiently specific to comply with Rule 9(b). Plaintiffs are alleging at least 255 occurrences of fraudulent misrepresentation because there are 255 employers who had adopted STEP Plans by 1998. 2dAmended Compl. 1 90. The document attached to the original complaint as exhibit E clearly identifies each of these employers. For that reason, Plaintiffs need not identify the specific dates when these employers were solicited. Their claim is sufficiently particularized to put the Insurance Companies on notice of what constitutes the allegedly fraudulent conduct and when it occurred; the solicitation dates are information presumably within Defendants' own knowledge. The Court therefore denies the Insurance Companies' motion to dismiss Count 5.

4. Counts 6 - 8

In Counts 6 through 8, Plaintiffs allege that all the defendants violated and conspired to violate RICO. These claims were not included in prior versions of the complaint. Specifically, Counts 6 and 7 allege violations of RICO under 18 U.S.C. § 1962(c); Count 8 alleges a conspiracy to violate

RICO under § 1962(d). Defendants assert several grounds for dismissal, one of which we can dispose of quickly because we rejected a similar argument made in Defendants' motions to dismiss the original complaint. The Administrative Defendants argue that Plaintiffs' RICO claims are time barred because Plaintiffs knew or should have known of their claims more than four years before the action was filed and thus did not meet RICO's four-year statute of limitations.[7] Specifically, they argue that at the time Plaintiffs adopted the STEP plan they had been advised that its tax status was uncertain and, therefore, they had four years from the adoption of the Plan in December 1995 to bring a RICO claim. This argument parallels Defendants' assertion in the previous round of motions to dismiss that Plaintiffs' Consumer Fraud Act claim was time barred.

In rejecting that argument, we noted that "[t]he question of when plaintiffs should have learned of their claims is an issue of fact, properly reserved for a motion for summary judgment." *Daniels*, 2003 WL 22053580, at *5 (citing *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 441-442 (7th Cir. 1994)). We stated that, "[t]hough defendants provide some evidence that the tax status of plaintiffs' STEP Plan was known to be uncertain, that evidence does not demonstrate conclusively that Plaintiffs should have known of their claim prior to February 14, 2000, three years before

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[7] The Court agrees with Plaintiffs that their RICO claims, which arise from the same conduct alleged in the original complaint, relate back to the date the original complaint was filed. *See* Fed. R. Civ. P. 15(c)(2).

they filed their suit." *Id.* Defendants' assertion that Plaintiffs' RICO claims are time-barred are rejected for the same reason we rejected Defendants' assertion that Plaintiffs' Consumer Fraud Act claims were time-barred.

Defendants also offer other grounds for dismissing Counts 6 through 8. Essentially they challenge the sufficiency of the pleading as to each element required to state a claim under RICO. To state a claim for a violation of RICO under 18 D.S.C. § 1962(c), Plaintiffs must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima* v. *Imrex Co.*, 473 U.S. 479,496 (1985) (footnote omitted). They "must allege sufficient facts to support each element." *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 727 (7th Cir. 1998). The Supreme Court has held that to plead sufficiently the conduct element of § 1962(c), "a plaintiff must allege that the defendant 'participated in the operation or management of the enterprise itself,' and that the defendant played 'some part in directing the enterprise's affairs.'" *Id.* (quoting *Reves v. Ernst 27& Young*, 507 U.S. 170, 179 (1993)). "In short, mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management of the enterprise." *Id.* That means that "simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under § 1962(c)." *Id.* at 728 (citing *Emery v. American Gen. Fin., Inc.*, 134 F.3d 1321, 1325 (7111 Cir. 1998))

In hopes of satisfying the enterprise element, Plaintiffs assert two theories of what constitutes the criminal enterprise for purposes of their RICO claims. In Count 6, Plaintiffs al-

lege that the STEP Plan is an enterprise for purposes of RICO; in Count 7, they allege that Defendants constitute an association-in-fact enterprise. These track the two types of associations recognized as enterprises in § 1961(4). "The first encompasses organizations such as corporations and partnerships, and other 'legal entities.' The second covers 'any union or group of individuals associated in fact although not a legal entity.'" *U.S. v. Turkette*, 452 U.S. 575, 58182 (1981).

Whichever category an association falls into, it is not a RICO enterprise unless it has "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision making." *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir. 2000) (citing *Jennings v. Emry*, 910 F.2d 1434, 1440 (7111 Cir. 1990); internal quotation marks omitted). A plaintiff need not plead "mūch structure, but the enterprise must have some continuity and some differentiation of the roles within it." *Richmond v. Nationwide Cassel*, 52 F.3d 640, 645 (7th Cir. 1995) (citing *Burdette v. Miller*, 957 F.2d 1375, 1379 (7th Cir; 1992)). In addition, a plaintiff cannot adequately allege an enterprise by asserting what the association does rather than what it is. *Stachon*, 229 F.3d at676 (citing *Jennings*, 910 F.21d at 1440) In other words, a pattern of racketeering activity does not itself reflect the existence of an enterprise. *Turkette*, 452 U.S. at 583. "[B]ecause a RICO enterprise is more than a group of people who get together to commit a pattern of racketeering activity, there must be an organization with a structure and goals separate from the predicate acts themselves." *Stachon*, 229

F.3d at 675 (internal quotation marks and citations omitted). Thus to survive Defendants' motions to dismiss, Plaintiffs must allege more than just a scheme or conspiracy to defraud consumers, "otherwise, ~every conspiracy to commit fraud that requires more than one person to commit is a RICO organization and consequently every fraud that requires more than one person to commit is a RICO violation.'" *Id.* at 676 (quoting *Bachman* v. *Bears, Stearns & Co.*, 178 F.3d 930,932 (7th Cir. 1999)).

To satisfy the pattern requirement, a plaintiff must "plead sufficient facts to show that the [defendants] engaged in a pattern of racketeering activity," which "consists, at a minimum, of two predicate acts of racketeering (committed within a ten-year time period)." *Slaney*, 244 F.3d at 598-99 (citing *Goren*, 156 F.3d at 728). The plaintiff must allege that "'the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Vicom, Inc.* v. *Harbridge Merchant Services, Inc.*, 20 F.3d 771, 779 (7th Cir. 1994) (emphasis original) (quoting *N.J., Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)).

The Supreme Court has recognized two types of continuity: closed- and open-ended. "In order to demonstrate a pattern over a closed period, a RICO plaintiff must 'prove] a series of related predicates extending over a substantial period of time, *Vicom*, 20 F.3d at 779 (quoting *N.J., Inc.*, 492 U.S. at 242). Factors relevant to this durational measure are "'the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of

distinct injuries. ", *Id.* at 780 (quoting *Morgan* v. *Bank of Waukegan,* 804 F.2d 970,975 (7th Cir. 1986»). The Seventh Circuit has said that "a time frame of less than nine months likely does not satisfy the duration requirement." *Id.* As for the number of predicate acts, the Seventh Circuit has said that multiple acts of mail or wire fraud do not necessarily form a pattern because [m]ail and wire fraud are " perhaps unique among the various sorts of 'racketeering activity' possible under RICO in that the existence of a multiplicity of predicate acts. . . may be no indication of the requisite continuity of the underlying fraudulent activity. ", *Id.* at 781 (quoting *Lipin Enterprises, Inc.* v. *Lee,* 803 F.2d 322,325 (7th Cir. 1986) (Cudahy, J., concurring)).

Alternatively, the Supreme Court has held that "open-ended continuity may satisfy the continuity prong of the pattern requirement regardless of its brevity." *Id.* at 782 (citing *RJ., Inc.,* 492 U.S. at 242). To allege open-ended continuity, a plaintiff must assert that "(1) 'a specific " threat of repetition' exists, (2) 'the predicates are a regular way of conducting [an] ongoing legitimate business,' or (3) 'the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purpose.'" *Id. (citing H.J., Inc.,,* 492 U.S. at 24243). If the alleged conduct focused on one" goal, a plaintiff usually cannot allege open-ended continuity. *Id.* at 783 (citation omitted). And "bald assertions" of continued activity, such as "James Elliot continues his racketeering activities," do not properly allege a threat of continuity. *Id.* However, a plaintiff need not allege a specific threat of continuity if she can assert that "'the predicate acts are a regular way of conducting [the] defendant's ongoing

legitimate business. *Id.* (quoting *HJ., Inc.*, 492 U.S. at 243). Under this showing of open-ended continuity, Plaintiffs would have to allege that mail and wire fraud or embezzlement are routinely employed by Defendants in the conduct of their businesses.

To satisfy the final element, racketeering activity, Plaintiffs must allege that Defendants committed acts violating one or more of the statutes listed in § 1961(1). Plaintiffs allege that Defendants engaged in mail and wire fraud and embezzlement. Allegations of mail or wire fraud even when asserted as predicate acts and not stand-alone offenses - must be pled with particularity in compliance with Fed. R. Civ. P. 9(b). *Slaney*, 244 F.3d at 599. That means a plaintiff must "allege 'the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentatic was communicated to the plaintiff'" *Goren*, 156 F.3d at 729 (quoting *Vicom*, 20F.3d at 777). In a multiple defendant case such as this, a plaintiff must "plead sufficient facts to notify each defendant of his alleged participation in the scheme." *Id.* at 726 (citing *Vicom*, 20 F.3d at 778). Rule 9(b) does not apply to Plaintiffs' claims that Defendants engaged in embezzlement.

In addition, "to state a viable claim for conspiracy under § 1962(d), a plaintiff must allege that (1) the defendant agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity, and (2) the defendant further agreed that someone would commit at least two predicate acts to accomplish those goals." *Slaney*, 244 F.3d at 600 (citing *La*

chmund v. ADM Investor Services, Inc., 191 F.3d 777, 784 (7th Cir. 1999)). This means the conduct and pattern elements for a RICO conspiracy claim are less stringent than for a claim under RICO's substantive prohibitions. For example, a plaintiff alleging a RICO conspiracy need not plead that defendants agreed "to commit personally two predicate acts of racketeering" or that they can be "characterized as an operator or manager of a RICO enterprise under *Reves v. Ernst & Young*. 507 U.S. 170 (1993).".*Goren*. 156 F.3d at 731 (citations omitted). However. the Seventh Circuit has cautioned "that the broad construction of the RICO conspiracy provision should not be used by the courts 'to criminalize mere association with an enterprise *Id.* at 731-32(citing *United States v. Neapolitan,* 791 F.2d 489, 498 (7th Cir. 1986)). Thus "in order to plead a viable § 1962(d) claim," a plaintiff must allege that the defendants "'agreed to the objective of a violation of RICO. ". *Id.* at 732 (citing *Neapolitan. 791* F.2d at 498).

Now that we have set forth the relevant law, the Court will address Defendants' contentions. Defendants. argue that Counts 6 and 7 do not sufficiently allege the conduct and enterprise elements necessary to state a claim under RICO. Specifically, the Insurance Companies, Prudential and Murphy contend that Plaintiffs have not alleged adequately that they operated a criminal enterprise, which Plaintiffs identify in Count 6 as being the STEP Plan and in Count 7 as a conglomeration of the Defendants. All Defendants argue that Plaintiffs have failed to allege an association in-fact enterprise in Count 7. The STEP Plan is a legal entity and, as the Plan documents quoted above indicate, the Plan has an ongo

ing structure that is organized to facilitate decision making by designated actors within a management hierarchy. Therefore, it qualifies as an enterprise for purposes of RICO. However, Plaintiffs have failed to allege how Defendants as a group constitute an association in-fact. Plaintiffs do not allege that Defendants have formed a relationship with an ongoing structure conducive to hierarchical or consensual decision making, as required by *Stachon* to plead an association-in-fact enterprise for purposes of RICO. Instead, Plaintiffs allege that Defendants all participated in a scheme to defraud Plaintiffs. But the Seventh Circuit has made clear that a plaintiff cannot allege an enterprise by asserting what the association does rather than what it is. *Stachon*, 229 F.3d at 676 (citing *Jennings*, *910* F.2d at 1440). Thus, Count 7 fails to state a claim.

However, because the STEP Plan qualifies as an enterprise, we must consider whether in Count 6 Plaintiffs have adequately pled the other three elements necessary to state a claim for a RICO violation. Our discussion above about who were Plan fiduciaries - that is, who had discretionary authority to manage the STEP Plan - is informative in determining whether Plaintiffs have sufficiently alleged the "conduct" aspect of a RICO claim. Plaintiffs have failed to allege that the Insurance Companies, Prudential or Murphy "conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs in *Richmond*, 52 F.3d at 646 (citation and internal quotation marks omitted; emphasis in original). They have not alleged that the Insurance Companies, Prudential or Murphy participated in the operation or management of the STEP Plan, as required under *Goren* to meet the

conduct element. In fact, the Plan documents make clear that the insurers' participation in Plan management was limited to administrative functions with respect to the insurance policies. Compl. Ex. A § 9.12. Performance of such services for the STEP Plan- even if the Insurance Companies knew the Plan was engaged in wrongdoing - is not enough to characterize their involvement with the Plan as "conduct" of an enterprise under RICO. *Goren*, 156 F.3dat 728. However, as discussed above the Administrative Defendants and U.S. Trust were responsible for managing the Plan they served as the Plan sponsors, trustees, and administrators. Thus Plaintiffs have satisfied the conduct element with regards to the Administrative Defendants and U.S. Trust but not the Insurance Companies, Prudential or Murphy, who are for this reason dismissed from Count 6.

We next must consider whether Plaintiffs have sufficiently alleged the pattern and racketeering elements as to the Administrative Defendants and U.S. Trust. Defendants' challenges to Count 6 crescendo with their claim that Plaintiffs have failed adequately to allege predicate criminal acts because the allegations of mail and wire fraud do not meet the particularity requirements of Rule 9(b). "[A]llegations of fraud in a civil RICO complaint are subject to the heightened pleading standard of Fed. R. Civ. P. 9(b), which requires a plaintiff to plead all averments of fraud with particularity." *Slaney*, 244 F.3d at 597 (citing *Goren*, 156 F.3d at 726). But before considering whether the allegations of fraud are pled with particularity, we will consider Defendants' contention that the communications complained of were not fraudulent.

Of the ten allegations of mail fraud made by Plaintiffs, only three (2d Amended Compl. ¶¶ 460 (a)(3), (b)(4) and (b)(5) actually allege fraud - the others do not allege a knowing misrepresentation. Two of those allegations (¶ 460(b)(4) & (b)(5) involve alleged fraud by Hartford. We have dismissed Hartford from the RICO claims; and its conduct cannot serve as the basis for RICO claims against the Administrative Defendants or U.S. Trust, who are not alleged to have participated in Hartford's purported fraud. Plaintiffs' only allegation of wire fraud, an allegation that the Benistar Entities misrepresented the outcome of a case in an e-mail, does allege fraud involving the Administrative Defendants. Thus Plaintiffs have only alleged two pertinent incidents of wire or mail fraud.

These two alleged incidents of fraud can constitute predicate acts only if they have been pled with particularity, meaning Plaintiffs must allege the who, what, when, where and how of the fraud. In the allegation of mail fraud, Plaintiffs allege that on September 30, 2003 the Benistar Entities sent a letter to Jack Robinson misrepresenting the outcome of a lawsuit involving the Benistar Entities. 2d Amended Compl.460(a)(3). In the allegation of wire fraud, Plaintiffs allege that on September 29, 2003, the Benistar Entities sent an e-mail to all participating employers repeating the misrepresentation made to Robinson. *Id.* ¶ 460(£)(1). Both allegations comply with Rule 9(b).

The Seventh Circuit has stated, however, that two acts of mail or wire fraud may not be enough to establish the pattern needed to state a claim under RICO. *See Vicom,* 20F.3d at 781. Significantly, the two acts are based on a single mis

statement made twice over a two day period. The only substantial differences between the acts is the method of communication - ie., one via e-mail arid the other via mail- and the number of people reached. The propagation of one alleged lie through multiple channels of communication over a two day period certainly does not constitute a pattern under either the closed-ended or open-ended theories of continuity. In short, Plaintiffs have failed to allege closed-ended continuity because they are essentially complaining only of one act; they have failed to allege open-ended continuity because this single example of a broadly distributed misrepresentation does not suggest this is a regular way the Administrative Defendants conduct the business of the STEP Plan.

A pattern of racketeering activity exists, however, when Plaintiffs' claims of embezzlement are thrown into the mix. Rule 9(b) does not apply to allegations of embezzlement, as they do not involve averments of fraud" within the meaning of Rule 9(b). "Embezzlement occurs. when a person who has lawfully received funds willfully diverts them to his own . unauthorized use." *Associates in Adolescent Psychiatry v. Home Life Insurance Co.* 941 F.2d 561,570 (7th Cir. 1991) (citing *United States v. Marquardt*, 786 F.2d 771, 780 (7th Cir. 1986)). Plaintiffs allege seven incidents of embezzlement by the Administrative Defendants. The alleged incidents, taken collectively, paint a picture of the Administrative Defendants abusing their fiduciary duties by using Plan assets for their own advantage, denying Plaintiffs benefits so that the Administrative Defendants could continue making money off of the funds, siphoning Plan assets for their own use, and using Plan funds to perpetrate a ruse to

induce Plaintiffs to continue' participating in the Plan and thus continue generating fees for the Administrative Defendants. 2d Amended Compl. ¶ 459. This satisfies both closed-ended and open-ended continuity in that it describes multiple events over a lengthy period of time to the injury of many victims and suggests it is a way the Administrative Defendants have done business and will continue to do business in connection with the STEP Plan.

The Administrative Defendants argue that Plaintiffs have not alleged two acts of racketeering by Teplitzky or Mellon. We agree as to Mellon but not Teplitzky. One of Plaintiffs' allegations is that STEP Plan funds were used to pay for a Plan participant's litigation regarding the tax status of contributions the participant made to the Plan. *Id.* ¶ 459(b). Although Teplitzky is not specifically named in ¶459(b), Plaintiffs state in ~ 278 that Teplitzky may have been the one to approve the expenditure. The second allegation involving Teplitzky is that he willfully retained the Prudential demutualization proceeds that should have been added to the Plan assets. *Id*¶ 459(c). In contrast, Plaintiffs make only one allegation regarding Mellon. Plaintiffs allege that Mellon failed to notify employers when termination events occurred, preventing the payout of benefits and enabling Defendants to continue deriving benefits from funds that should have been paid out to the participants. *Id.* ~ 459(c). We will not assume that simply by virtue of being the Plan trustee, Mellon was involved in all the acts of embezzlement alleged to have been committed by the Administrative Defendants. Mellon is therefore dismissed from Count 6, because Plaintiffs have not alleged it engaged m two predicate acts. We otherwise

deny the Administrative Defendants' motion to dismiss Count 6. Plaintiffs also have failed to allege that U.S. Trust engaged in two predicate acts, and thus its motion to dismiss is granted.

Because we have already determined that Plaintiffs failed to allege an association-in-fact enterprise in Count 7, there remains only to determine whether Plaintiffs can proceed on Count 8. The Insurance Companies argue that Count 8 must be dismissed because the Seventh Circuit has held that a claim under § 1962(d) must be dismissed if based on the same facts as a claim under § 1962(c) that has been dismissed by the court. *Stachon*, 229 F.3d at 677 (citing *Midwest Grinding Co.* v. *Spitz*, 976 F.2d 1016, 1026 (7th Cir. 1992)). We agree that Count 8 must be dismissed as to the Insurance Companies, Prudential, Murphy and U.S. Trust on those grounds. In contrast, the Administrative Defendants' Motion to Dismiss Count 8 must be denied because Plaintiffs have alleged that the Administrative Defendants agreed "to participate in the affairs of an enterprise through a pattern of racketeering activity" already discussed and that they agreed at least two predicate acts would be committed to accomplish these goals. *Slaney*, 244 F.3d at 600.

Although we have dismissed Mellon from Count 6, we do not dismiss it from Count 8.To state a claim of RICO conspiracy, Plaintiffs need only plead that Defendants agreed that someone would engage in two predicate acts - it is not necessary that each Defendant agreed that it would commit two predicate acts on its own.

Conclusion

Plaintiffs' motion to alter, amend, or clarify the order of March 18, 2004 [docket # 183] is granted as to Count 2 but is otherwise denied. The Court's memorandum opinion and order of March 18, 2004 is vacated, and this amended memorandum opinion and order is issued in its place.

For the reasons stated above, the Court grants Prudential's Motion to Dismiss [docket # 124] except as to Count 2. The Court grants Murphy's Motion to Dismiss [docket # 122] in its entirety. The Court grants the Insurance Companies' Motion to Dismiss [docket # 121] as to Counts 1,4, 6, 7, and 8 but denies it as to Counts 2 and 5. The Court grants the Administrative Defendants' Motion to Dismiss and Strike the Second Amended Complaint [docket# 123-1, 2] as to Counts 1 and 7, denies the motion as to Counts 2, 3, and 8, and denies in part and grants in part the motion as to Count 6 (see above). The Court grants U.S. Trust's Motion to Dismiss [docket # 161] as to Counts 1,6, 7, and 8 but denies it as to Count 2. Metropolitan Life is directed to file a reply brief in support of its pending motion for summary judgment within ten days of this order.

MATTHEW F. KENNELLY
United States District Judge

Date: April 14, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS,*et al*	: Case No. 03-CV-1550
	:
Plaintiffs,	: Judge Matthew F. Kennelly
	:
v.	:
WAYNE BURSEY*etal*	:
	:
Defendants.	:

NOTICE OF MOTION

TO: All Counsel of Record
(See attached Service List)

PLEASE TAKE NOTICE that on Thursday. April 1, 2004 at 9:30 a.m. or as soon thereafter as counsel may be heard, the undersigned will appear before the Hon. Matthew F. Kennelly, or any judge sitting in his stead, in the courtroom usually occupied by him in Room 2103 of the Federal Dirksen Building at 219 S. Dearborn, Chicago, Illinois, and then and there present **Plaintiffs' Motion for Preliminary Injunction Against Administrative Defendants and New Benistar Defendants and Leave to File a Brief in Excess of Fifteen Pages and Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Injunction,**

Appointment of Receiver, and Other Equitable Relief, copies of which are attached.

Dated: March 29, 2004

Respectfully submitted

By:_____
Attorney for Plaintiff

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APPENDIX K – MOTION FOR PRELIMINARY INJUNCTION, DATED MARCH 29, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS,*et al*	: Case No. 03-CV-1550
	:
Plaintiffs,	: Judge Matthew F. Kennelly
	:
v.	:
WAYNE BURSEY*etal*	:
	:
Defendants.	:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AGAINST ADMINISTRATIVE DEFENDANTS AND NEW BENISTAR DEFENDANTS AND LEAVE TO FILE A BRIEF IN EXCESS OF FIFTEEN PAGES

Plaintiffs, on behalf of themselves and all others similarly situated, hereby submit the motion for preliminary injunction against Defendants Wayne Bursey, Daniel Carpenter, STEP .Plan Services, Inc., Benistar Insurance Group, Inc., Mellon Trust of New York and Teplitzky &Co., P.C. (collectively "Administrative Defendants") and Defendants Benistar Ltd., Benistar Employer Services Trust Corp., Benistar 419 Plan, Benistar 419 Admin. Services, me. And Benistar 419 Plan Services, Inc. (collectively "New Benistar Defendants") from further operating as Trustee of the Severance Trust Ex-

ecutive Programs ("STEP plans"). In support of this motion, Plaintiffs state as follows and provide memorandum in support thereof:

1. Plaintiffs are all participants in, or employee sponsors of, STEP plans. As of 1999, approximately 225 employers had adopted STEP plans, with a listed cash surrender value of over $47,000,000 contained in life insurance policies covering 857 participants.

2. Plaintiffs allege that the Administrative Defendants and New Benistar Defendants have individually, and collectively in conspiracy, breached their fiduciary duties by: (1) failing to operate the plan in conformance with the plan documents; (2) failing to act in the best interest of the plan participants; (3) failing to disclose significant tax court litigation and IRS ruling against a STEP Plan that assessed significant penalties and called into question the legitimacy of the STEP plans and any resultant tax deductions; (4) participating in a scheme to churn plan assets and plan policies for the sole purpose of creating insurance commission for Benistar and its officers; and (5) mandating a termination process that is counter to the plan documents and calls for looting of plan assets to the exclusive benefit of Benistar and not the Plan.

3. While each of these breaches is equally reprehensible, the most concerning for the purposes of the present motion is the churning of plan assets and policies to create commission for the use of Benistar and its officers.

4. On February 5, 2004, the Chairman of Benistar, Daniel Carpenter, was indicted for fraudulently misappropriateing $9 million dollars in client funds that had been entrusted to .Benistar. According to the indictment,' instead of holding these funds in escrow, Carpenter used the money to engage in high risk, speculative trading in the options market, where he eventually lost over $9 million of Benistar's clients money. *See* Indictment of Daniel E. Carpenter (hereinafter "Indictment''' attached as Exhibit B).

5. In light of this indictment, it has become crystal clear that the Carpenter, as CEO of Benistar, is using his company to loot Plan assets for his own purposes. As such, it is imperative that this Court issue a preliminary injunction as soon as possible to prevent any persons or organization currently associated with the Plan and its assets from controlling those assets in any way.

Standard for Preliminary Injunction

6. A court will grant a preliminary injunction where the party requesting said injunction can establish: (1) a likelihood of success on the merits, (2) no adequate remedy at law, (3) he will suffer irreparable harm if the injunction is not granted. . *Foodcomm Int'l v. Barry, 328* F.3d 300, 303 (7th Cir. 2003). If the Court is satisfied that the moving party can meet these three factors, it will then balance the irreparable harm suffered by the moving party against that suffered by the nonmoving party if the injunction is granted. *Ty, Inc. v. Jones Group, Inc., 237* F.3d 891, 895 (7th Cir. 2001). Finally, the Court must consider the public interest in granting or denying the injunction.

7. Courts balance these factors on a "sliding scale" that is, the more likely the Plaintiff will succeed on the merits the less the irreparable harm need to favor the Plaintiff.

Application to the Case at Hand

8. To succeed on the merits, Plaintiffs will have to establish (1) that their plan is an ERISA plan, (2) that the Defendants are fiduciaries, and (3) that the Defendants breached the fiduciary duty. Under 29 U.S.C. § 1002, it is undeniable that Plaintiffs Sanchez & Daniels created an employee welfare benefit plan to provide medical, as well as severance benefits.

10. Second, neither the Administrative Defendants nor the New Benistar Defendants have disputed their role as fiduciaries to the STEP plans. Clearly, each of the Defendants within these groups either "exercises...discretionary authority or discretionary control" over the assets, "renders investment advice for a fee," or has "any discretionary authority or discretionary responsibility in the administration of such plan." *See* 29 D.S.C. § 1002 (21)(A).

11. Finally, as discussed above (and established in greater detail in the supporting memorandum), these Defendants have breached their fiduciary duty in multiple ways, perhaps most egregiously through the Chairman of Benistar's use of the funds as his personal gambling stipend.

12. As to the irreparable harm to the Plaintiffs, again, there can be little argument. Defendants have now been connected with the funneling of over $9 million of client funds from trusts through risky investments in the options market.

Further, Defendants have attempted strong-arm tactics to control the funds of the STEP plans, penalizing participants for not continuing to keep their monies with Defendants. With the possibility of hundreds of employees being without medical benefits, this abuse must stop.

13. Conversely, no harm will befall the Defendants if they are prohibited from further controlling the plan assets. The only conceivable argument would be they would no longer be able to profit from the STEP plan assets, some think they are prohibited from doing so anyway.

14. Finally, there are two very important and very simple public interests that will be served by enjoining the Defendants from further access to the funds. First, the goals of ERISA in providing benefits to employees will be protected, and, second, this Court will prevent any further breaches of fiduciary duty on behalf of the Defendants.

Leave to File Memorandum in Excess of Fifteen (15) Pages

15. Although Plaintiffs counsel has attempted by all means to confine this brief to fifteen pages, the complicated facts of this case, the complicated nature of the law and the necessity to show a likelihood of success on the merits for preliminary injunction required the brief to exceed fifteen pages.

16. Plaintiffs do not believe such an allowance will prejudice the Defendant in anyway.

For the foregoing reasons, as well as those provided in the attached memorandum, Plaintiffs respectfully request this Court give leave for Plaintiffs to file their brief in excess of fifteen (15) pages, and request this honorable court enter a preliminary injunction against the Administrative Defendants and the New Benistar Defendants to prevent further abuse and waste of the STEP plan assets.

Dated: March 29, 2004

Respectfully submitted

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APPENDIX L– SUMMARY OF FACTS IN SUPPORT OF MOTION, DATED MARCH 24, 2004

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, et al. individually and on behalf of others similarly situated Plaintiffs,	: CIVIL ACTION NO. 03-CV-1550
v.	
WAYNE BURSEY, et al Defendants	: Hon. Matthew F. Kennelly : Room 2106

PLAINTIFFS' SUMMARY OF FACTS OF RECORD IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, APPOINTMENT OF A RECEIVER, AND OTHER RELIEF

The following facts are derived primarily from the following sources:

- VERIFIED COMPLAINT OF JOHN DANIELS (Exhibits)

- SECOND AMENDED COMPLAINT (Exhibits)

- RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF METROPOLITAN LIFE INSURANCE COMPANY (Exhibits)

- LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF METROPOLITAN (Facts stated therein and Exhibits)

1. Daniel Carpenter was indicted by a federal grand jury in Boston, Massachusetts on February 5, 2004 on the charges of mail fraud and wire fraud. [Exhibit A to Plaintiff's Response, Rule 56.1 Statement].

2. Carpenter was subjected pre-judgment of attachment from the Cahaly cases [SAC Exh. K,L; Cahaly v. Benistar Property Exchange Trust Co., Inc., 16 Mass.L.Rptr. 220, 2003 WL 21246167 (Mass.Super. 2003); Cahaly v. Benistar Property Exchange Trust Co., 73 Conn.App. 267, 277 (2002). aff'g 2001 WL 706967 (Conn. Super. 2001)

3. The Massachusetts and Connecticut Courts found Carpenter and the Benistar entities to be alter-egos of each other. *Id.*

4. The judgment from the *Cahaly* case against now Carpenter exceeds $25 million. *Id.*

5. BENISTAR, Ltd. has been found to be the "parent" entity among this group of related enterprises by trial courts in Suffolk County, Massachusetts and Connecticut. See, SAC, Exhibit L.

6. Jeffrey Teplitzky gave a Declaration of January 21, 2003 in the United States District Court for the Eastern District of Pennsylvania in the case of *Sanchez & Daniels et al v Bursey* et al. [Response, Exhibit C.]

7. At paragraph 3 his Declaration, Teplitzky confirmed that U.S. Trust resigned as Plan Sponsor on February 14, 1997. He states that "*STEP, Inc. replaced U.S. Trust....*"

8. In their Counterclaim filed February 21, 2003 in the Eastern District of Pennsylvania Defendant STEP Plan Services alleges at paragraph 6: "On February 14, 1997, *U.S. Trust resigned and STEP, Inc. replaced it* as Plan Sponsor. *The appointment of STEP, Inc. as Sponsor was effectuated by the amendment of the STEP Plan* & Trust Document as of February 14, 1997." [Response, Exhibit D],

9. Neither Teplitsky nor STEP Services say that U.S. Trust appointed them or how that "amendment" took place.

10. The fiduciaries of the STEP trust, including Mellon, U.S. Trust, Teplitzky, STEP Services, Inc., Benistar Administrative Services, Inc., or Carpenter, never told the employers and participants in the STEP plan about the Massachusetts or Connecticut litigation against Carpenter and the Benistar entities, that a Tax Court case had been settled to substantially eliminate the deductions claimed under STEP, or that the people in control of their plans were alleged to be defalcators whose Chairman exercised his Fifth Amendment privilege on the witness stand. [See, Affidavit of Donald Fleisher, Response, Exhibit G].

11. The disputed 1997 STEP [VC Ex. A] contains the following provisions that demonstrate control of the plan administrator and plan sponsor 1.26 (Investment Manager(s) [a/k/a insurance agents] appointed by Plan Sponsor); ¶5.1 (Plan Administrator causes Trustee to buy the amount of insurance, and the policy and all appurtenant rights exercised as directed by Plan Administrator; ¶5.2 ((a)Employer only elects a life insurance benefit, (b) Employer contributes to the Trust Fund, (f) Trustee as directed by Plan Administrator shall have full and complete control over any permanent policy); ¶8.2(g) (Plan Administrator, Investment Advisor or Trustee solely responsible for investments of the Fund); ¶ 9.2.3 (only Plan Administrator or Investment Manager authorized to direct Trustee); ¶ 9.5(c) (Trustee does not select the issuer of the insurance contracts, takes direction from Plan Administrator); 9.13 (Insurer takes directions from Plan Administrator, Independent Fiduciary and Trustee); 9.13 (Insurer performs administrative functions with respect to policies, funds in general accounts the responsibility of Insurer, Insurer liable for failure to comply with ERISA and regulations).

12. The original 1994 STEP plan required a 70% vote of employers to confirm a successor sponsor to U.S. Trust, if U.S. Trust resigned and identified a suitable successor.

13. Under the STEP trust, the Plan Sponsor is the primary controlling fiduciary, with power to appoint all others.

14. U.S. Trust resigned in 1997.

15. There is no evidence that the 70% vote ever occurred.

16. There is no evidence that STEP, Inc. was a suitable replacement for U.S. Trust as Plan Sponsor.

17. The Verified Complaint states throughout that Benistar/SSI did not have the authority to execute any release or otherwise remove employers or employees from the STEP plan because no Trustee or Sponsor had authority to act after the departure of U.S. Trust.

18. STEP, Inc. appointed Mellon Trust (and its predecessor as trustee in 1997).

19. Prior to the appointment of STEP SERVICES, INC., Teplitzky exercised primary control of STEP trust assets.

20. When contacted for a surrender of plan assets by STEP SERVICES, INC., the checks from MetLife were not paid to the rightful trustee of the STEP trust, and were defalcated to National Financial Services, LLC.

21. There is no present evidence that MetLife demanded proof that STEP SERVICES, INC. had Trustee powers under the laws of Connecticut.

22. STEP SERVICES, INC. had no Trustee powers under the laws of Connecticut during the period relevant to this matter.

23. US TRUST, TRUSTEE of the STEP TRUST was the named owner of policies purchased on behalf of the STEP trust while U.S. Trust was trustee. [Response, Exhibit B].

24. The Plaintiffs received discovery from MetLife including 3 insurance policies Bates numbered MET 189 through MET 347. [Response, Exhibit B.]

25. The documents were generated in connection with STEP's procurement of cash from the policies [the "Policies"] insuring participants Arvind L Suthar, policy 941250433 UM [189 to 216], Ketan R. Sheth, policy 941250432 UM [252 to 281], and Prakesh J. Patel 941250431 UM [319 to 347]. newly discovered non-Benistar entity [abstraction from an employee benefit plan].

26. On September 25, 2002, Daniel Carpenter sent MetLife three cash surrender requests for the Policies of behalf of "STEP Plan and Trust (STEP Plan Services, Inc. as Plan Sponsor)." [MET 203, 259, 319].

27. Carpenter signed the forms, witnessed by STEP Services employee Luann Pinkham. *Id.*

28. On September 30, 2002, MetLife wrote back to STEP, confirmed that the policies were owned by US Trust under the STEP....Trust, and requested that U.S. Trust sign the forms. [MET 211, 256, 324].

29. Pinkham responded to MetLife on October 8, 2002 with 4 pieces of alleged evidence of Trustee appointment. [MET 252].

30. MetLife received from Pinkham a letter dated February 26, 2002 from Daniel Carpenter on behalf of STEP Plan Services, Inc. to J.K. Thomas, Vice President of Mellon Trust, Philadelphia. [MET 253] in which Carpenter con

firms that "STEP Plan Services, Inc., has accepted the appointment to act as successor trustee to the STEP Plan & Trust."

31. Carpenter did not reveal to Mellon in MET 253 that STEP Plan Services does not have trustee authority under the laws of Connecticut or elsewhere.

32. Also sent by Pinkham to MetLife was a letter dated February 13, 2002 from Mellon Trust in Philadelphia to Carpenter (representing STEP Plan Services) and defendant Jeffrey Teplizky. [MET 254].

33. That letter [MET 254] advises that on February 7, 2002, Teplizky & Co. resigned as Plan Sponsor and Administrator, that Teplitzky appointed STEP Services as the successor Plan Sponsor and Administrator, and that Mellon was getting additional fees.

34. The letter of Feb. 7, 2002 confirms that STEP Plan Services was to tell Mellon who the new Trustee would be. Carpenter signed the letter for STEP Plan Services.

35. Mellon does not indicate in the letter of Feb. 13, 2002 MET 254 that it would exercise any independent judgment to protect plan assets.

36. STEP Services succeeded in convincing MetLife to surrender the policies aforesaid, including those described in the Motion for Summary Judgment.

37. MetLife never confirmed with U.S. Trust or through independent investigation the validity of Benistar or SSI's assertion of authority over the STEP trust.

38. As demonstrated on MET 258, the Sheth policy had been funded with $114,651, but the Administrator had taken $27,908 of loans against the policy. After payment of interest and a surrender penalty of $7,198, STEP Services received a check from Met Life of $77,830.58.

39. MET 281 describes the commissions earned on the sale of this product. The producer got 84% and his manager got 16% of the initial year target premium.

40. The insurance agents and manager then earned additional commissions on renewal premiums paid on the policies.

41. The initial death benefit was $1,027,178 on the policy, but the agents had designed the policy to have increasing death benefits. [MET 270].

42. MET 266 is a check in the amount of $77,830.58 from MetLife and payable to STEP Plan & Trust. The endorsement shows that it was deposited at JP Morgan Chase Bank, but for the benefit of National Financial Services, LLC.

43. The check issued in connection with the Suthar Policy [MET 189] reflects the same diversion of funds by deposit to National Financial Services LLC as MET 266.

44. From these deposits, it may be deduced that Carpenter removed the 20% termination charges he assessed against the STEP participants who fell for his undisclosed, illegal, unilateral modification of the terms of STEP. [See Response, Exhibit D, ¶ 12, of the 254 employers in STEP, 78

elected to stay, 104 cashed out [paying the 20% amount], and 67 transferred to Carpenter's Benistar 419 Plan [paying the 10% amount].]

45. Accordingly, by his plan, Carpenter caused a reduction of STEP's asset base by 75%.

46. Carpenter controls the Benistar 419 Plan. [Par. 2, above.]

47. Carpenter controls Benistar Admin Services, Inc., the alleged present plan administrator of the STEP trust. [Par. 3, above.]

48. The Massachusetts court found large unexplained transfers between Benistar Property Exchange Trust and Benistar Admin. Services, Inc. [See paragraph 2, above.]

49. Carpenter exercised executive authority and domination of STEP Services, Inc. and command over plan assets in transactions involving MetLife. [Par. 31, 35 above.]

50. Carpenter used the same pattern with Hartford Life. [Response Exhibit F].

51. Kenneth Katz, a MetLife agent, shared an address with the alleged Sponsor, STEP, Inc. who followed U.S. Trust and appointed Teplitzky. [Schedule F, Verified Complaint.]

52. Daniel Carpenter gave a public statement on November 14, 2002, at a hearing held by the U.S. Treasury Department and the Internal Revenue Service. Harlan Weller and James Holland, employees of Treasury and IRS, respect

tively, engaged Carpenter in a colloquy during the hearing. These statements and colloquy are contained in pages 93 through 122 of a true and correct transcript of testimony, attached as Exhibit G to Plaintiff's Response to the Motion to Dismiss:

> MR. CARPENTER admitted being with "Benistar 419 Plan Services." [P93, line 8,9.]
>
> MR. CARPENTER admitted "our firm, Benistar, is one of the largest welfare benefit plan administration firms in the country. We are currently the administrator of two of the largest so-called 419 plans, the Benistar 419 Plan, which is a death-benefit-only plan; and the STEP Plan, which is the largest of the severance pay trusts. I am a tax attorney by background, and have been involved with employee benefit plans, in general, and welfare benefit plans, specifically, for over years. I am generally recognized as one of the leading authorities on welfare benefit plans, and 419A(f)(6) plans, in particular." [P.94, line 2-12.]
>
> MR. CARPENTER admitted: "[B]y definition, a 419 plan is an employee welfare benefit plan." [P. 98, line 2-3.]
>
> MR. CARPENTER admitted: "There are no severance pay insurance carriers in America, so employer self-funding is the only answer. [P. 99, line 5-13]. I just wanted to make it clear that any of *the people who abused 419 and used it as deferred*

comp in disguise, they've left our industry." [P. 103, line 5-7.]

MR. CARPENTER admitted: "I was known as the "STEP killer" before 1997. My transformation from being the leading opponent of STEP to the fact that our firm purchased STEP earlier this year is a transformation of biblical proportions. *It's just like the -- you know, Saul's out there killing Christians one day, then he wakes up and he's the Apostle Paul.*" [P. 103, line 21 – P. 104, line 7].

MR. CARPENTER said: ". . .in the STEP Plan there is no such distribution [to employees upon termination], but in the Benistar 419 Plan, before these regs were published, if an employer sent to us a termination notice saying, "We wish to terminate from the benefit plan," there could never be a reversion to the employer. The money goes one way. It goes into the plan, and it goes out to the insured participant. We make sure, first of all, that there is [P. 105, line 14-21] actuarial funding, sufficient to cover all of the benefits of the plans before any distribution is made."

MR. CARPENTER admitted: "We have a large surplus right now in the Benistar 419 Plan . . . and the life insurance policies you talked about; they're owned by the plan."

MR. CARPENTER admitted: "Think of the Benistar Plan as a small insurance company. No

body gains from positive experience-rating other than the Benistar 419 Plan. We're growing."

MR. CARPENTER admitted: "Every time that there's a forfeiture, we grow by that. Any time we pay out a death benefit of $10 million, and we collect it from the insurance company under our reinsurance agreement -- $10.3 million that $300,000 stays with the Benistar 419 Plan." [P. 106, line 14-18].

MR. WELLER: So, I'm an employer who's participating in the Benistar Plan. The employer, for some reason has been sold a competing plan, and he decides that the other plan is better. So the employer sends you a letter saying, "I want to get out of the Benistar Plan."[P. 106, line 19 – P. 107 line 2].

MR. CARPENTER: Correct.

MR. WELLER: Does that trigger money to me, or does that employer -- I mean, what happens when --

MR. CARPENTER: No. In the case you just gave, we would transfer it to the other plan owners. There's no tax in a trust-to-trust transfer.

MR. HOLLAND: Suppose he doesn't tell you about the other plan? He just sends you a note, "I want out."

MR. CARPENTER: Then we would 1099 him. In other words, if we terminate you for failure to pay premiums –

MR. WELLER: If he tells you, "I don't want to play with you anymore."

MR. CARPENTER: Right, we would basically say, "Tell us what you want to do. Do you want us to roll it over to a sole-employer trust? Do you want to send it to another trust? Do you want us to distribute the policies?" And when we distribute the policies, we would report that to the IRS on a 1099. So it's a taxable event when we distribute that policy. [P. 107, line 3-21].

MR. WELLER: So, as the employee I'm getting –-

MR. CARPENTER: What's that?

MR. WELLER: When you distribute it to another single- employer trust, you're sending in a 1099?

MR. CARPENTER: "No, when it's a trust-to-trust transfer, there is no taxable event."

MR. HOLLAND: But, let me understand. As an employee, I'm getting a life insurance policy. In the hypothetical you say you distribute it to the employee.

MR. CARPENTER: Correct.

MR. WELLER: I'm getting a life insurance policy because my employer decided to withdraw from the plan.

MR. CARPENTER: Correct.

MR. WELLER: That's an employee benefit to get payments upon at someone's withdrawal.

MR. CARPENTER: If we terminated . . . and I distribute that cash value life insurance policy to that employee, everybody in this room knows that you send out a 1099, because that's taxable income to the employee. I think that that's the way it should be done on termination. [P. 108, line 3 –21, P. 109, line 1 - 4].

MR. CARPENTER: [I]f you had asked me before July 11,[2002] do you need to keep a severance benefit separate from the death benefit? We also have a disability trust, a long-term care trust. I would have told you that experience-rating requires that you have to have separate trusts for separate benefits, and that's one of the issues that was not addressed in the July 11 regs. And that's one of the things that I .... I don't understand these other trusts that can have three or four benefits being paid out of the same pool of money. I don't see how you can do that and not have some type of quasi-experience-rating. [P. 112, line 7 –18.]

MR. CARPENTER: [I]f somebody wants to be an abusive Dr. . . . they can literally come into the

> Benistar Plan; and if they want to terminate two to three years later, we will distribute that amount. Whatever's in the policy, yeah, we'll distribute that amount and we will tax them on it. But you want to know what? The plan no longer owes them a benefit. But in the STEP plan, there is no exit strategy, and if they voluntarily terminate, then that fat-cat doctor will lose all of the money he's put in to date. So that's why I'm saying that in the severance arena, we totally agree with you. There are other plans out there that are deferred comp in disguise. In the Benistar 419 Plan, you can only get out by dying, and then if you terminate, yes, we distribute the policy to you; and yes, then you have to pay taxes on it. [P. 122, line 6-21.]

53. There is no record of any formal amendment to the STEP plan and trust allowing the "exit strategies" discussed in Exhibit G to the Complaint which Carpenter said "did not exist" when he testified before Treasury Department and IRS officials

54. Wayne Bursey, president of STEP SERVICES, Inc. admitted on June 20, 2002 that the STEP trust was unable to pay its promised benefit claims. [Verified Complaint, Exhibit G].

55. Wayne Bursey, president of STEP SERVICES, Inc. admitted on June 20, 2002 that the STEP trust needed to take a 20% withdrawal of plan assets for itself in order to shield the plan from insolvency and from being classified as deferred compensation. [Verified Complaint, Exhibit G].

56. Throughout the history of STEP(prior to the involvement of Carpenter, Benistar and STEP Services, Inc.), promoters of STEP supplied opinion letters signed by Jeffrey Mamorsky, Esquire and his firms assuring that STEP was not a deferred compensation plan when the plan administrator did not demand a 10% fee. [Verified Complaint, Exhibit B, C.]

57. Wayne Bursey, president of STEP SERVICES, Inc. admitted on June 20, 2002 that the STEP trust, although insolvent would only would demand a 10% fee if the employer caused STEP trust assets to be transferred to the Benistar 419 plan . [Verified Complaint, Exhibit G].

58. As a requirement of said transfer, the employer's eligible employees would be required to purchase new life insurance. Id.

59. There is no evidence that the termination or transfers described in the foregoing paragraphs were made in the best interest of plan participants.

60. Carpenter and Benistar, directly and indirectly, obtained fees and other remuneration in connection with the termination or transfers.

61. There is no evidence that fiduciary ever proved that the amount of compensation taken from the plan assets of the 2/3 of the STEP employers, who terminated or transferred, were necessary or reasonable as required by ERISA.

62. There is no evidence that any fiduciary justified why new life insurance had to be purchased and why the existing

policies in STEP could not be transferred, in contradiction to what Carpenter said was possible in his testimony to IRS and Treasury.

63. Neither Carpenter nor the STEP entities allowed Sanchez & Daniels to transfer their STEP assets, in contradiction to Carpenter's statements about allowing transfers "to any plan."

64. Teplitzky's "sale" of the STEP rights was admitted by Carpenter in his testimony and reflected in a UCC statement on record in Connecticut.

65. Assets of the STEP plan showed no positive rate of return in several years while Teplizky and Carpenter were in control of them. [Verified Complaint Exhibit F and Exhibit FF to Response to Admin. Def. Mot. To Dismiss].

66. Defendant Hartford instructed its agents to stop doing business with Benistar's 419 plans prior to the institution of the lawsuits filed by Plaintiffs. [Affidavit of William Cook in support of pro hac vice application of John Koresko, par. 12, et seq.]

67. Carpenter and his controlled plans, by Jack E. Robinson, caused defamation lawsuits to be filed in Connecticut against plan participants, like Sanchez & Daniels, apparently for questioning the propriety of Benistar's actions.

68. Other associates of Carpenter and Benistar, Jack E. Robinson, and Donald Trudeau, were observed during testimony before this Court on an earlier matter, and found not to be credible.

69. Under Mr. Carpenter's definition, the STEP plan must be experience-rated in violation of Section 419A(f)(6) because multiple benefits are payable from cash values of a single life insurance policy for each employee. If this is true, then STEP must be terminated by its terms – now and under all previous versions of the plan.

70. Defendants, by their president Bursey, admitted that the STEP trust is insolvent.

Dated: March 24, 2004

Respectfully submitted,

_____

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APPENDIX M – SECOND AMENDED COMPLAINT, DATED NOVEMBER 7, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JOHN DANIELS,	:
MANUEL SANCHEZ,	: CIVIL ACTION NO
TIMOTHY HOFFMAN,	: 03-CV-1550
DIANE HUNTLEY,	:
JOSEPH BONACCORSI,	:
MARY OBRZUT,	:
EDWARD ORDONEZ,	:
individually and on	:
behalf of SANCHEZ &	:
DANIELS STEP PLAN	:
and on behalf of SANCHEZ	:
& DANIELS STEP	:
PLAN PARTICIPANTS and	:
similarly situated individuals	:
333 W. Wacker Drive,	:
Suite 500	:
Chicago, IL 60606	:
	:
SANCHEZ & DANIELS	:
and similarly situated employers	:
333 W. Wacker Drive, Suite 500	:
Chicago, IL 60606	:
Plaintiffs,	:
v.	:

WAYNE BURSEY :
100 Grist Mill Road :
Simsbury, CT 06070 :
:

DANIEL CARPENTER :
100 Grist Mill Road :
Simsbury, CT 06070 :
:

STEP PLAN SERVICES, INC. :
100 Grist Mill Road :
Simsbury, CT 06070 :

BENISTAR ADMIN SERVICES, INC. :
a/k/a BENSTAR ADMINISTRATIVE :
SERVICES, INC. :
507 Hopmeadow Street :
Simsbury, CT 06070 :
:

BENISTAR INSURANCE GROUP, INC. :
a/k/a BENISTAR :
a/k/a BENISTAR CORPORATION :
100 Grist Mill Road :
Simsbury, CT 06070 :
:

BENISTAR 419 PLAN SERVICES, INC. :
100 Grist Mill Road :
Simsbury, CT 06070 :
:

BENISTAR 419 ADMIN SERVICES, INC. :
a/k/a BENSTAR 419 ADMINISTRATIVE :
SERVICES, INC. :

100 Grist Mill Road :
Simsbury, CT 06070 :
:
BENISTAR 419 PLAN :
a/k/a BENSTAR 419 ADVANTAGE PLAN :
100 Grist Mill Road :
Simsbury, CT 06070 :
:
BENISTAR EMPLOYER SERVICES :
TRUST CORPORATION :
100 Grist Mill Road :

Simsbury, CT 06070 :
:
BENISTAR LTD :
a/k/a BENISTAR GROUP LTD :
100 Grist Mill Road :
Simsbury, CT 06070 :
:
MELLON TRUST OF NEW YORK :
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US TRUST OF NEW YORK :
City Place :
Hartford, CT 06103 :
:
TEPLITZKY & COMPANY P.C. :
One Bradley Road Bldg. 600 :
Woodbridge, CT 06525 :
:

PRUDENTIAL INSURANCE :
COMPANY OF AMERICA :
745 Broad Street :
Newark, NJ 07101 :
:
THOMAS J. MURPHY, individually and :
as an agent of :
:
CLU & ASSOCIATES :
1110 Jorie Blvd, Suite 202 :
OAK BROOK, IL 60523 :
:
BRUCE LEVY :
1901 Market Street, 32nd Floor :
Philadelphia, PA 19103 :
:
METLIFE, INC. :
1 Madison Ave. :
New York, NY 10010 :
:
NATIONAL LIFE INSURANCE CO.:
1 National Life Drive :
Montpelier, VT 05604 :
:
TRAVELERS INDEMNITY COMPANY :
OF CONNECTICUT :
(formerly EQUITABLE) :
One Tower Square, 2S2 Corporate tax:
Hartford, Ct 06183 :
:
HARTFORD LIFE INSURANCE CO.:

Hartford Plaza :
Hartford, CT 06115 :
ALLMERICA FINANCIAL BENEFIT :
INSURANCE COMPANY :
645 West Grand Driver Road :
Howell, MI 48843 :
:
NEW YORK LIFE INSURANCE COMPANY :
51 Madison Avenue :
New York, NY 10010 :
:
Defendants :

SECOND AMENDED COMPLAINT

Plaintiffs, JOHN DANIELS ("DANIELS"), MANUEL SANCHEZ ("SANCHEZ"), TIMOTHY V. HOFFMAN ("HOFFMAN"), DIANE C. HUNTLEY ("HUNTLEY"), JOSEPH P. BONACCORSI ("BONACCORSI"), MARY OBRZUT ("OBRZUT"), and EDWARD ORDONEZ ("ORDONEZ"), individually on and on behalf of SANCHEZ & DANIELS ("S&D"), SANCHEZ & DANIELS STEP PLAN ("S&D STEP PLAN") and SANCHEZ & DANIELS STEP PLAN PARTICIPANTS ("S&D PLAN PARTICIPANTS") by their undersigned counsel, allege as their Complaint against Defendants, WAYNE BURSEY ("BURSEY"), DANIEL CARPENTER ("CARPENTER"), STEP PLAN SERVICES, INC. ("STEP PLAN SERVICES"), BENISTAR ADMIN SERVICES, INC. a/k/a BENISTAR ADMINISTRATION SERVICES, INC. ("BENISTAR ADMIN"), BENISTAR INSURANCE GROUP, INC. a/k/a BENISTAR ("BENISTAR"), BENISTAR 419 PLAN SERVICES, INC.

("BENISTAR 419 SERVICES"), BENISTAR 419 PLAN a/k/a BENISTAR 419 ADVANTAGE PLAN ("BENISTAR 419 PLAN"), BENISTAR LTD a/k/a BENISTAR GROUP LTD ("BENISTAR LTD"), BENISTAR EMPLOYER SERVICES TRUST CORPORATION ("BENISTAR TRUST")[3], MELLON TRUST OF NEW YORK ("MELLON"), U.S. TRUST COMPANY OF NEW YORK ("US TRUST"), TEPLITZKY & COMPANY, P.C. ("TEPLITZKY"), PRUDENTIAL INSURANCE COMPANY OF AMERICA ("PRUDENTIAL"), THOMAS MURPHY ("MURPHY"), CLU & ASSOCIATES ("CLU"), BRUCE LEVY ("LEVY"), METLIFE, INC. ("METLIFE"), NATIONAL LIFE INSURANCE COMPANY ("NATIONAL LIFE"), HARTFORD LIFE INSURANCE COMPANY ("HARTFORD"), ALLMERICA FINANCIAL BENEFIT INSURANCE COMPANY("ALLMERICA"), NEW YORK LIFE INSURANCE COMPANY ("NEW YORK LIFE")[4] (collectively, "Defendants"), as follows:

Preliminary Statement

1. The lawsuit concerns the SANCHEZ & DANIELS STEP PLAN (the "S&D STEP PLAN"), a welfare benefit Plan established by S&D as a benefit for its em

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[3] BENISTAR, BENISTAR LTD, BENISTAR 419 PLAN, BENISTAR ADVANTAGE, BENISTAR ADMIN, and BENISTAR TRUST (collectively, "BENISTAR ENTITIES")

[4] PRUDENTIAL, METLIFE, NEW-YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE (collectively "INSURANCE COMPANIES")

ployees, and other similarly created STEP Plans ("STEP PLAN(S)") established by other employers for the benefit of their employees.

2. The individual Plaintiffs are Plan Participants in the S&D STEP PLAN. Plaintiff S&D is an employer sponsor, and a fiduciary of the S&D STEP PLAN.

3. On its 1999 Form 5500 filed with the IRS, TEPLITZKY disclosed that approximately 255 employers around the U.S. had adopted the STEP PLANS and TEPLITZKY listed insurance cash surrender value of over $47,000,000 contained in life insurance policies covering 857 Participants.

4. Plaintiffs, including the Class, claim that they were fraudulently induced by certain Defendants, including TEPLITZKY, LEVY, PRUDENTIAL, and MURPHY, with false promises to participate in an alleged multiple employer welfare benefit Plan that was in actuality an unlicensed insurance company. The inducement was in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The losses have yet to be calculated, and depend on a variety of factors, but will likely exceed $1.0 million and could possibly exceed $100 million.

5. Further Plaintiffs claim that certain Defendants, TEPLITZKY, MELLON, BENISTAR, BENISTAR ADMIN, and STEP SERVICES, participated or assisted in breaches of fiduciary duty, including self-dealing and conversion of Plan assets. These losses have yet to be calculated, and depend on a variety of factors, but will likely exceed $1.0 million and could possibly exceed $100 million.

6. Further the Plaintiffs claim that certain Defendants, INSURANCE COMPANIES, MELLON, BENISTAR, STEP SERVICES, BENISTAR ADMIN, CARPENTER, and BURSEY, were and/or are Fiduciaries or owe non-fiduciary duties to the S&D STEP PLAN and the other employer STEP PLANS. Further, Plaintiffs claim that Defendants breached fiduciary duties to each STEP PLAN participant in violation of the common law and ERISA § 409 (29 U.S.C. § 1109) in a variety of ways. Plaintiffs also claim that the Defendants are obliged, under ERISA and state common law, to make good to the Plan the loss it has suffered as a result of their fiduciary breaches. These losses have yet to be calculated, and depend on a variety of factors, but will likely exceed $1.0 million and could possibly exceed $100 million.

7. Because the claims apply to the Participants and beneficiaries as a whole, and because ERISA and common law authorizes Participants such as S&D STEP PLAN Participants to sue for Plan-wide relief for breaches of fiduciary duty, they seek to bring this action on behalf of themselves and the class of all the Participants and Beneficiaries of the STEP PLANS during the relevant period.

8. The controversy at issue in this case is the sum of the following: the illegal operation of an unlicensed insurance operation, the illegal activity of charging premiums and offering uninsured severance benefits, the illegitimate assumption of control of ERISA plan assets, the churning of those assets for fees and commissions, the refusal to surrender those assets to S&D's chosen fiduciary, the threatened dissipation of those assets because S&D re-

fused to capitulate to Defendants' illegal demands, the scurrilous act of bringing a baseless lawsuit to bully Plaintiffs into submission, the intentional gutting of the asset base of the STEP plan, the refusal to follow the command of plan documents so that the operators like TEPLITSKY and CARPENTER could continue their unlawful acts, the unilateral modification of plan documents to the detriment of participants and interested parties, the transfer of the STEP PLANS to an unsuitable fiduciary, and the inexcusable failure of a named fiduciary to tell anyone its principal had been accused of converting $9 million of trust money.

NATURE OF THE APPLICATION FOR PRELIMINARY INJUNCTION

9. Among the claims asserted in this action is that BENISTAR, BENISTAR ADMIN, STEP SERVICES, and various individual corporate officers, all have an irreconcilable conflict of interest in continuing to serve as Fiduciaries and/or contractors of the STEP PLANS.

10. It has become clear that actions that critically affect the interests of the Plan Participants are being taken by these same Defendant Fiduciaries notwithstanding their continuing breach of fiduciary duty.

11. BENISTAR, STEP SERVICES, BURSEY, and CARPENTER are currently in the process of churning policies and looting Plan assets in a scheme to terminate employer STEP PLANS.

12. BENISTAR, STEP SERVICES, BURSEY, and CARPENTER attempted to coerce S&D and similarly

situated employer sponsors to accept the dissipation of 20% of assets for employees, or suffer a 10% reduction and agree to transfer those assets to the BENISTAR 419 Plan, or suffer other adverse consequences.

13. BENISTAR, STEP SERVICES, BURSEY, and CARPENTER did not use reasonable means to make such assessments, and rather, BENISTAR and STEP SERVICES constructed these assessments with the intention of coercing employers to adopt the BENISTAR 419 Plan, a benefit Plan administered and sponsored by corporate affiliates of BENISTAR and/or STEP SERVICES.

14. BENISTAR, STEP SERVICES, BURSEY, and CARPENTER knew that they would derive additional insurance commissions, administration fees and other revenue and thus created an economic detriment for those employers who did not elect these options.

15. BENISTAR, STEP SERVICES, BURSEY, and CARPENTER knew or should have known that these options deviated in material respect from the STEP PLAN and Trust documents which these defendants were purported operating the STEP Plan pursuant to. A true and correct copy of the Plan Documents and Trust Documents is attached hereto as Exhibit "A".

16. At no time did BENISTAR, STEP SERVICES, BURSEY or CARPENTER offer to co-operate with employers in any other fashion, although other alternatives were available; and such failure to co-operate occurred because BENISTAR, STEP SERVICES, BURSEY, and/or

CARPENTER could not personally profit from offering other alternatives.

17. These actions by BENISTAR, STEP SERVICES, BURSEY and CARPENTER have left the STEP PLANS underfunded and have put the remaining employer STEP PLANS at risk of insolvency.

18. These actions by BENISTAR, STEP SERVICES, BURSEY and CARPENTER are breaches of fiduciary duty.

19. A Massachusetts jury returned a $9 million verdict against a BENISTAR entity, BENISTAR PROPERTY EXCHANGE TRUST CO. ("BENISTAR PROPERTY TRUST") and CARPENTER, finding that BENISTAR and CARPENTER misappropriated and misused trust funds associated with a property trust fund escrow. The Massachusetts Court added further damages that to date total at least $25 million of liability on the part of BENISTAR, BENISTAR ADMIN, and CARPENTER. See *Cahaly et al. v. Benistar Property Exchange Trust Co., Inc., et al., Nos. 01—116BLS2, ("Massachusetts Action"); Slip Op. (Mass. Super. Ct. Sept. 23, 2003),* Phase II Slip Op., Ex. "K"; Phase III Slip Op., Ex. "L").

20. The Massachusetts Action involved a pyramid scheme premised upon taking in funds to replace money that BENISTAR PROPERTY TRUST was charged with holding in escrow but instead had lost in failed stock option investments over two years prior to January 2001. *Id.*

21. In the Massachusetts Action, CARPENTER was also found personally responsible for the misuse of the escrow funds. The Massachusetts Court noted that the funds, controlled by CARPENTER, were used as a "source of funds to support Daniel's (CARPENTER) personal penchant for risky options trading on the stock market." *Id.*

22. The Massachusetts court further held that the related BENISTAR ENTITIES are sham corporations controlled by CARPENTER. *Id.*

23. The STEP PLANS had at least $1 million of available cash funds that were held in the BENISTAR ENTITIES accounts.

24. Upon information and belief, CARPENTER and his controlled sham enterprises and/or corporations are insolvent.

25. Upon information and belief, the jury verdict against the BENISTAR ENTITIES and CARPENTER for misappropriation and misuse of trusts funds mandated the loss of fidelity insurance and the bonding as required by ERISA Sec. 412 for the BENISTAR ENTITIES and CARPENTER.

26. Because Defendants' BENISTAR, STEP SERVICES, BURSEY, and CARPENTER, conduct with respect to these issues may seriously jeopardize the interests of the Plan Participants in the immediate future, Plaintiffs request for themselves and the Class an immediate preliminary injunction prohibiting BENISTAR ENTITIES, STEP

SERVICES, BURSEY, and CARPENTER, from terminating the employer STEP PLANS and dissipating further assets.

27. As it is essential that the STEP PLANS have a decision maker on these, and other issues that may arise given the nature of the employee Plans, the Court should appoint a neutral fiduciary to manage the individual employer STEP Plan or allow each employer to personally chose a fiduciary to manage the individual employers STEP Plan.

Parties

28. Plaintiff SANCHEZ & DANIELS ("S&D") is an Illinois general partnership involved in the practice of law with a place of business in Chicago, Illinois, at the address set forth in the caption above.

29. Plaintiff JOHN DANIELS ("DANIELS") is a general partner of S&D with a place of business in Chicago, Illinois, at the address set forth in the caption above. DANIELS is a participant of the S&D STEP PLAN.

30. Plaintiff MANUEL SANCHEZ ("SANCHEZ") is a general partner of S&D with a place of business in Chicago, Illinois, at the address set forth in the caption above. SANCHEZ is a participant of the S&D STEP PLAN.

31. Plaintiff TIMOTHY HOFFMAN ("HOFFMAN") is a general partner of S&D with a place of business in Chicago, Illinois, at the address set forth in the caption above. HOFFMAN is a participant of the S&D STEP PLAN.

32. Plaintiff DIANE HUNTLEY ("HUNTLEY") is an employee of S&D with a place of business in Chicago, Illinois, at the address set forth in the caption above. HUNTLEY is a participant of the S&D STEP PLAN.

33. Plaintiff JOSEPH BONACCORSI ("BONACCORSI ") was a general partner of S&D with a place of business in Chicago, Illinois, at the address set forth in the caption above. BONACCORSI is a participant of the S&D STEP PLAN.

34. Plaintiff MARY OBRZUT ("OBRZUT") is an employee of S&D with a place of business in Chicago, Illinois, at the address set forth in the caption above. OBRZUT is a participant of the S&D STEP PLAN.

35. Plaintiff EDWARD ORDONEZ ("ORDONEZ") is an employee of S&D with a place of business in Chicago, Illinois, at the address set forth in the caption above. ORDONEZ is a participant of the S&D STEP PLAN.

36. Defendant STEP PLAN SERVICES, INC. ("STEP SERVICES") is a Connecticut corporation with a principal place of business at the address set forth in the caption above. STEP SERVICES is an agent and/or affiliate of BENISTAR INSURANCE GROUP, INC. ("BENISTAR INSURANCE") a/k/a BENISTAR ("BENISTAR").

37. Defendant BENISTAR ADMININSTRATION SERVICES, INC. a/k/a BENISTAR ADMIN SERVICE, INC. ("BENISTAR ADMIN"), is a Delaware Corporation with a principal place of business at the address

set forth in the caption above. BENISTAR ADMIN is an agent and/or affiliate of BENISTAR and STEP SERVICES.

38. Defendant BENISTAR INSURANCE GROUP, INC. ("BENISTAR INSURANCE") a/k/a BENISTAR a/k/a BENISTAR CORPORATION ("BENISTAR") is a Delaware corporation with a principal place of business at the address set forth in the caption above.

39. Defendant BENISTAR 419 PLAN SERVICES, INC. ("BENISTAR 419 SERVICES") is a Delaware corporation with a principal place of business at the address set forth in the caption above.

40. Defendant BENISTAR 419 PLAN a/k/a BENISTAR 419 ADVANTAGE PLAN ("BENISTAR 419 PLAN") is a Connecticut company with a principal place of business at the address set forth in the caption above.

41. Defendant BENISTAR EMPLOYER SERVICES TRUST CORPORATION ("BENISTAR TRUST") is a Connecticut company with a principal place of business at the address set forth in the caption above.

42. Defendant BENISTAR LTD a/k/a BENISTAR GROUP LTD ("BENISTAR LTD") is a Connecticut corporation with a principal place of business as set forth in the caption above. BENISTAR LTD is the parent company of the BENISTAR 419 PLAN.

43. Defendant DANIEL CARPENTER ("CARPENTER") is a Connecticut citizen and a principal of the

BENISTAR ENTITIES. CARPENTER controls the BENISTAR ENTITIES and currently controls STEP SERVICES.

44. Upon information and belief, Defendant WAYNE BURSEY ("BURSEY") is a Connecticut citizen and a principal of BENISTAR and STEP SERVICES.

45. Upon information and belief, MELLON TRUST OF NEW YORK ("MELLON"), with a principal place of business at the address listed above, is a company licensed to do business in the State of Illinois.

46. Upon information and belief, PRUDENTIAL INSURANCE COMPANY ("PRUDENTIAL"), with a principal place of business at the address listed above, is an insurance company licensed to do business in the State of Illinois.

47. Upon information and belief, METLIFE, INC. ("METLIFE"), with a principal place of business at the address listed above, is an insurance company licensed to do business in the State of Illinois.

48. Upon information and belief, NEW YORK LIFE INSURANCE COMPANY ("NEW YORK LIFE"), with a principal place of business at the address listed above, is an insurance company licensed to do business in the State of Illinois.

49. Upon information and belief, ALLMERICA FINANCIAL BENEFIT INSURANCE COMPANY

("ALLMERICA"), with a principal place of business at the address listed above, is an insurance company licensed to do business in the State of Illinois.

50. Upon information and belief, HARTFORD LIFE INSURANCE COMPANY ("HARTFORD"), with a principal place of business at the address listed above, is an insurance company licensed to do business in the State of Illinois.

51. Upon information and belief, NATIONAL LIFE INSURANCE COMPANY ("NATIONAL LIFE"), with a principal place of business at the address listed above, is an insurance company licensed to do business in the State of Illinois.

52. Upon information and belief, CLU & ASSOCIATES ("CLU") with a principal place of business at the address listed above was at all relevant times an Illinois Insurance Agency licensed to do business in the State of Illinois.

53. Upon information and belief, Defendant THOMAS MURPHY ("MURPHY"), with a principal place of business at the address listed above, was at all relevant times, an agent of CLU and PRUDENTIAL.

54. Upon information and belief, US TRUST ("US TRUST"), with a principal place of business at the address listed above, is a company licensed to do business in the State of Illinois.

55. US TRUST, MELLON, STEP SERVICES, CARPENTER and BENISTAR ENTITIES, at all relevant times, were doing business within the State of Illinois.

56. PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD and NATIONAL LIFE, at all relevant times, were doing business within the State of Illinois as an insurance company providing insurance and insurance services to S&D and employers like S&D.

Jurisdiction and Venue

57. This Court has subject matter jurisdiction over the claims presented in this action. This matter was removed from state court by Defendants. A fiduciary has a right to sue under ERISA to reclaim plan assets from another fiduciary or anyone else. ERISA sec. 502. An employer has the right at common law to sue for actions, both before and after the adoption of a plan, that damaged it and its employees. The STEP trust is not an ERISA plan because it fails the statutory tests for plan status.

58. This Court has personal jurisdiction over the Defendants, all of whom are residents of the United States and certain of whom are residents of Illinois, as Defendants have transacted business in this district and committed tortuous acts within this district that have caused significant injury to residents of this district.

59. Venue is proper in that: 1) the transaction at issue or some part thereof occurred in Cook County, Illinois; 2) the S&D STEP PLAN was originally contracted for in Cook County; 3) some or all of the fiduciary breaches for

which relief is sought occurred in this Cook County; 4) injury occurred in Cook County; 5) the original employee benefit Plan was solicited in Cook County; and 6) S&D's primary place of business is in Cook County.

APPROPRIATENESS OF CLASS ACTION

60. Plaintiffs bring this action on behalf of themselves and a class (the "Class") of all persons similarly situated. The Class itself consists: 1) of all persons who were employee sponsors at any time from January 1, 1992, to the present (the "Class Period") and who made or maintained participation in the STEP Plans; 2) Participants in or beneficiaries of the Plan, at any time from January 1, 1992, to the present (the "Class Period") and who made or maintained participation in the STEP Plans. To the extent that the employer claims diverge from claims attributable to the participants and beneficiaries, such would be the basis of two similarly situated defined subclasses.

61. Plaintiffs meet the prerequisites to bring this action on behalf of the Class because:

Numerosity. The Class consists of over 200 employers and 1,000 individuals and is so numerous that joinder of all members as individual plaintiffs is impracticable.

Appropriateness. The Class action devise is appropriate to adjudicate these multiple claims.

Commonality. There are questions of law and fact common to the Class. The common law claims, pursuant to the STEP

trust document, are to be determined under the laws of New York.

Typicality. Plaintiffs' claims are typical of the claims of the class.

Adequacy. Plaintiffs will fairly and adequately protect the interests of the Class. They have no interests that are antagonistic to or in conflict with the interest of the Class as a whole, and they have engaged competent counsel, experienced in ERISA welfare benefit actions and insurance actions, as well as in other class and complex litigation, to ensure protection of the interests of the Class as a whole.

Predominance. Common issues predominate over individual issues.

62. This action is maintainable as a class action for the following four independent reasons:

a. The prosecution of separate actions by the members of the Class would create a risk of inconsistent or varying adjudications with respect to the individual members of the Class, which would establish incompatible standards of conduct for

Defendants.

b. The prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

c. The Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

d. Questions of law and fact common to members of the Class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

e. The Class action device is appropriate to adjudicate these multiple claims.

FIDUCIARY STATUS OF CERTAIN DEFENDANTS

63. During the Class Period, Defendants CARPENTER, BURSEY, STEP SERVICES, BENISTAR, BENISTAR ADMIN, MELLON, US TRUST, and TEPLITZKY, (collectively "ADMINISTRATIVE FIDUCIARY DEFENDANTS") had discretionary authority respecting management of the S&D STEP PLAN and other employer STEP PLANS (collectively "STEP PLANS") and/or the management or disposition of plan assets and had discretionary authority or responsibility for the administration of the plans.

64. During the Class Period, all of the ADMINISTRATIVE FIDUCIARY DEFENDANTS acted as Fiduciaries of the STEP PLANS and the S&D STEP PLAN pursuant to the common law and/or ERISA § 3(21)(A) (29 U.S.C. § 1002(21)(A)) and the law interpreting that section.

65. During the Class Period, under the original adoption agreements signed by S&D, TEPLITZKY, and MELLON were designated as named Fiduciaries under the S&D STEP PLAN and, upon information and belief, all STEP PLANS.

66. Upon the constructive termination of the STEP PLANS, employers such as S&D were Fiduciaries.

67. STEP SERVICES is a holder of Plan assets, and its affiliates are Plan Fiduciaries because they control those assets.

68. PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE are, and/or were during the class period, holders of STEP plan assets within one or more variable insurance policies, held in other than a general account, which they actively manage as a separate portfolio.

69. PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE had discretionary authority control and/or authority over the variable insurance policies, including the ability to declare the interest rate to be credited to the funds deposited under the contracts, the ability to determine surrender charges and investment adjustments, and the ability to amend the insurance contract.

70. PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE also had the ability to name the fund managers for the variable subaccounts within the variable policies, thereby mate

rially influencing the rate of return eventually available under the contracts and the amount of insurance cash value eventually available for payment as benefits.

71. Because each asset in STEP is an asset of an employee benefit plan established by an individual employer, PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE hold assets of employee benefit plans.

72. Because all assets in STEP were theoretically available for all claims of all participating employees of the employers who adopted a STEP Plan, each Insurance Company (PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE) holding STEP assets owed a duty to all employees who received and/or were eligible to receive benefits under the STEP PLANS.

73. MURPHY, as an agent of PRUDENTIAL, and the other agents who represented the INSURANCE COMPANIES, were all also fiduciaries since they also had the ability to recommend and implement investment decisions relating to the relative allocations of the amounts in the variable subaccounts of each employer's STEP arrangement.

74. PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, NATIONAL LIFE, and the ADMINISTRATIVE FIDUCIARY DEFENDANTS never properly allocated the amounts in the STEP PLANS during the relevant periods, either due to negligence or willful disregard, resulting in imprudent investments and losses to the STEP PLANS.

75. During the Class Period, as the insurance policies were an asset of the STEP PLANS; PRUDENTIAL, METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE were fiduciaries to each individual employer STEP PLAN, as the assets of all STEP PLANS were available for all liabilities of all STEP PLANS.

76. Any provisions of the STEP PLAN documents or associated instruments that purport to relieve any of the fiduciaries or defendants from liability are void as against public policy pursuant to ERISA Sec. 410.

77. The INSURANCE COMPANIES and their insurance agents are also liable as de facto fiduciaries for looting each plan by compelling purchase of expensive life insurance and taking unreasonable compensation.

78. As the STEP trust is not an ERISA plan unto itself, defendants are nothing more than additional fiduciaries or non-fiduciaries with liability.

79. The only ERISA plan is the arrangement, the S&D STEP PLAN, between S&D and its employees, and similar arrangements between the class employer sponsors and their employees. Although that arrangement may take the form of language contained in the STEP documents, those documents cannot act to grant Defendants with exclusivity reserved to the statutory fiduciary position imposed by an employer under ERISA.

80. A diagram illustrating each STEP arrangement is attached here to Exhibit "N".

81. ADMINISTRATIVE FIDUCIARY DEFENDANTS and the INSURANCE COMPANIES are simply additional persons who have fiduciary responsibilities, but they at no time disturb S&D's position which is imposed by law.

82. In addition, under ERISA, in various circumstances, non-Fiduciaries who knowingly participate in fiduciary breaches may themselves be liable. To the extent any of the ADMINISTRATIVE FIDUCIARY DEFENDANTS and INSURANCE COMPANIES are not Fiduciaries, they remain liable as non-Fiduciaries who knowingly participated in the fiduciary breaches described below.

SEVERANCE TRUST EXECUTIVE PROGRAM ("STEP") PLANS

83. THE SEVERANCE TRUST EXECUTIVE PROGRAM ("STEP") was conceived by US TRUST and other persons, including PRUDENTIAL and LEVY, in the early 1990s as a vehicle for employers to allegedly purchase life insurance on a tax deductible basis. (Marketing Materials Exs. "B" and "M").

84. The STEP purported to be a welfare benefit Plan described in section 419A(f)(6) of the Internal Revenue Code ("IRC") and referred to itself as the STEP PLAN. *Id.*

85. US TRUST was the original Plan Sponsor and Trustee of STEP a/k/a STEP PLAN.

86. STEP and the individual employer STEP PLANS were designed to provide Participants with 1) death benefits, 2) disability benefits, and 3) severance benefits. *Id.*

87. The PROMOTERS and insurance agents representing the INSURANCE COMPANIES presented tax opinion letters from a large New York law firm and an actuarial opinion from none less than Price Waterhouse's CPAs. (Opinions, Ex. "C").

88. Employers adopted their employer STEP Plan by executing Plan Adoption Agreements and then forwarding sizable Plan "contributions." (Adoption Agreement, EX. "D").

89. After selecting a benefit with the help of insurance agents of the INSURANCE COMPANIES, the employer who adopted the Plan would then arrange for select employees to execute applications for permanent life insurance.

90. On its 1998 Form 5500 filed with the IRS, STEP Inc. disclosed that 255 employers were in the Plans. (IRS Form 5550, Ex. "E"). The names of the participating employers, agents, contract (insurance policy) issue dates, and commissions paid in that year are listed thereon. *See Id.* Insurance cash surrender value was over $36,000,000 and cash totaled over $3.5 million. *Id.* Insurance agents earned $1.094 million in commissions that year. *Id.* Professional fees assessed against the Plan in that year were an astounding $1,778,839, or approximately 15% of the $12 million in Plan contributions. *Id.*

91. On its 1999 Form 5500 filed with the IRS, STEP, Inc. disclosed that approximately 255 employers around the U.S. had adopted the Plans. (IRS Form 5550, Ex. "F"). The names of the participating employers, agents, contract (insurance policy) issue dates, and commissions paid in that year are listed thereon. *See Id.* STEP, Inc. listed insurance cash surrender value of over $47,000,000 contained in life insurance policies covering 857 Participants. *Id.* STEP, Inc. also listed over $3 million of cash available for benefits. *Id.* While the death benefits offered by STEP, Inc. were insured, it appears STEP, Inc. was also relying on cash and cash surrender values for its severance and disability benefits of each STEP PLAN. *Id.*

THE MARKETING AND PROMOTION OF STEP

92. LEVY and the INSURANCE COMPANIES (collectively "PROMOTERS") designed the benefits of STEP in such a way that they would primarily benefit highly-compensated owner-employees.

93. The PROMOTERS also designed "severance events" that appeared to be "involuntary," but in fact, were in most cases subject to direct or indirect control by the owner-employer Plan Participants. *Id.*

94. The benefits of each STEP Plan were marketed by LEVY, MURPHY, and the INSURANCE COMPANIES as a substitute for nonqualified deferred compensation. *Id.*

95. Under prevailing case law, Treasury Regulations, and Labor Regulations, a nonqualified deferred com-

pensation benefit is not presently deductible. A severance benefit that is directly or indirectly payable on retirement is not a welfare benefit. It is clear that a Plan that could have the same effect of deferred compensation, but be currently deductible, would be attractive to employers if the Plan were properly constructed.

96. Tax deductibility was the primary marketing point for each STEP Plan. *Id.*

97. Each STEP Plan was marketed as a tax shelter for highly compensated employees.

98. While disguised as a welfare Plan, insurance agents routinely sold the individual STEP Plan "with a wink and a nod" repeating a much different scenario from a common homogeneous scheme. The PROMOTERS knew that highly compensated employees, who controlled the businesses that bought into each STEP Plan, could pretty much control severance events. That set-up would invalidate the welfare benefit nature of the Plan and destroy the current deduction taken by any sponsoring employer if the IRS ever found out.

99. STEP PLANS were attractive and extremely profitable to the INSURANCE COMPANIES, because the PROMOTERS designed STEP to invest in life insurance policies to fund the severance and death benefits. *Id.*

100. While telling the IRS that each STEP Plan was a welfare Plan, the PROMOTERS fed the purchasers of the insurance products the story that the STEP PLAN con-

cept was "legitimate" and that the amounts were fully "deductible."

101. The STEP PLANS were marketed from the offices of Philadelphia Financial Group ("PFG") in Philadelphia, Pennsylvania.

102. LEVY, a Philadelphia life insurance agent, was a principal of PFG.

103. LEVY negotiated with each of the INSURANCE COMPANIES so that they would market and promote the STEP PLANS, give LEVY insurance contracts, and give LEVY exclusive access to the agents of each company.

104. LEVY received insurance commissions, from the insurance companies and/or their agents, directly or indirectly, from the sale of STEP PLAN benefits to the employers, including S&D. (*See* Ex. "E").

105. LEVY obtained these commissions, directly or indirectly, by virtue of a commission split agreement he negotiated with INSURANCE COMPANIES and their agents.

106. PFG and LEVY controlled the marketing materials presented to possible STEP PLAN clients, subject to the review and modifications demanded by the INSURANCE COMPANIES.

107. The Defendants, including PFG and LEVY, created marketing materials that claimed the STEP arrangement was a welfare benefit plan for purposes of ERISA.

108. PFG, and LEVY in concert with the INSURANCE COMPANIES certified agents to sell STEP PLANS calling these agents "STEP CERTIFIED AGENTS".

109. THE STEP CERTIFIED AGENTS were trained by STEP, PFG, and LEVY.

110. Due to having STEP CERTIFIED AGENTS, a common methodology of marketing and sales was used throughout the class during the class period.

111. The INSURANCE COMPANIES expended large amounts of effort and money to cause their agents to sell the STEP PLAN concept.

112. The INSURANCE COMPANIES prepared and distributed marketing materials, promoting the STEP PLAN concept, that were substantially fairly uniform as part of the common methodology used in marketing and sales throughout the class during the class period.

113. The INSURANCE COMPANIES and the ADMINISTRATIVE FIDUCIARY DEFENDANTS used the marketing materials created by the STEP promoters and customized them to their own format. For example, Prudential and NY Life customized the materials in the fashion attached hereto as Exhibits "A-D" and "M".

114. The INSURANCE COMPANIES and ADMINISTRATIVE FIDUCIARY DEFENDANTS distributed these Marketing Materials to each of agents listed in the Form 5500s attached as Exhibit E and F, and distribution of such materials was accomplished first by way of the United

States Mail on or before the Date of Issue for each Policy (contract date) articulated in said Exhibit. (See Exs. "E" and "F").

115. Said agents of the INSURANCE COMPANIES and ADMINISTRATIVE DEFENDANTS, whose names and addresses are listed in said Form 5500s, then distributed these Marketing Materials to each of the Employers either by hand or by the use of the United States Mail on or before the Date of Issue for each Policy (contract date) articulated in said Exhibits. (See Exs. "E" and "F").

116. The Marketing Materials contained various untrue statements, including but not limited to:

a. that STEP was a plan;

b. that STEP was an employee welfare benefit plan;

c. that contributions to STEP would be free from creditors claims;

d. that contributions to STEP were properly deductible as welfare benefit plan contributions for purposes of the Internal Revenue Code.

117. The Marketing Materials did not advise any of the Employers or Employees of numerous material negative factors about the STEP arrangements, including but not limited to the following:

a. that STEP was a MEWA or an unlicensed entity engaged in the business of insurance;

b. that promotion or sale of STEP plan insurance coverage was or could be illegal in the states where STEP was created and promoted;

c. that the STEP Trust document did not require the purchase of life insurance as the sole investment vehicle of the plan;

d. that life insurance is not the most suitable investment vehicle for a plan like STEP whose primary benefit was severance benefits;

e. that STEP benefits could be more efficiently funded with lower cost term insurance and less risky investments like annuities or municipal bonds;

f. that the Internal Revenue Service had never accepted New York State Unemployment Insurance Law as the guiding law for purposes of determining federal income tax deductions and negate current deductions;

g. that schemes to make a benefit payable to owner employees, by disguising a severance event which was in reality voluntary, would cause such plan not to be regarded as a welfare benefit plan.

118. PFG, PRUDENTIAL, and LEVY prevailed upon Jeffrey Mamorsky, Esquire ("Mamorsky") [then of Curtiss, Mallet-Prevost, et al, now of Greenberg Traurig] to make changes to the STEP PLANS, designed in part to exculpate PRUDENTIAL from liability in violation of ERISA.

119. Mamorsky also performed fiduciary audits of the STEP PLANS for fees although such audits rendered little or no value to participants or beneficiaries.

120. Mamorsky prepared a STEP tax opinion letter ("Mamorsky Opinion") which was distributed as part of STEP's marketing materials by the INSURANCE COMPANIES.

121. The Mamorsky Opinion states that STEP is an employee benefit plan.

122. The Marketing Materials referred to the opinion letters of attorney Jeffrey Mamorsky and the CPA firm Price Waterhouse ("the Opinion Letters").

123. Such Opinion Letters were distributed by the Insurance Companies and Administrative Defendants to their agents, and then to the Employers aforesaid, by the means and on the dates aforesaid.

124. Such Opinion Letters contained some or all of the material misstatements and omissions of the Marketing Materials referred to above.

125. METLIFE, NEW YORK LIFE, ALLMERICA, HARTFORD, and NATIONAL LIFE conducted similar reviews of the STEP PLAN documents and marketing procedures and instructed LEVY and PFG as to the procedures and methods each insurance company would accept, although in practice such procedures and methods were substantially homogeneous.

126. The INSURANCE COMPANIES required that the TRUSTEE use their insurance products and specifically a certain type. Ex. A Sec. 5.1(a).

127. Defendant HARTFORD prepared and manned a booth with HARTFORD agents and company personnel at various broker-dealer and other agent gatherings, including the 1996 convention of the Prime Group (Prime Financial Services) in upstate New York at the Sagamore Hotel at which convention HARTFORD disseminated printed marketing materials to its agents and the public in general, to promote the STEP PLAN concept.

128. Defendant NEW YORK LIFE went so far as to promote the STEP PLAN concept to the exclusion of other legal welfare plans.

129. NEW YORK LIFE exclusively promoted the STEP PLAN concept, in part, because of its institutional and capital commitment to the success of STEP PLAN concept among its agent base.

130. Department of Labor Regulations, 29 CFR sec. 2510.3-2(b), provides in pertinent part that "(1) For purposes of Title I of the Act [ERISA] and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination

of an employee's service provided that: (i) Such payments are not contingent, directly or indirectly, upon the employee's retiring. . . ."

131. The INSURANCE COMPANIES, ADMINISTRATIVE FIDUCIARY DEFENDANTS and other Fiduciaries marketed STEP in the manner aforesaid knowing that, as to owner-employees of the Employers who would ultimately make the decision whether or not an Employer would purchase benefits through the STEP arrangement, the severance payments to be made would be contingent directly or indirectly upon the employee's retirement.

132. The INSURANCE COMPANIES, ADMINISTRATIVE FIDUCIARY DEFENDANTS and other Fiduciaries were aware of various court cases, IRS Notice 95-34, and professional literature that pointed out the aforesaid misrepresentations of the STEP arrangement, but continued to market or accept plan assets regardless and without informing Employers or Participating Employees of same.

133. For example, on or before November 6, 1996, Martin Kaplin, an executive of Defendant New York Life ("NEW YORK LIFE") read an article published in the *Journal of Pension Benefits* entitled "Notice 95-34: A Line In the Sand for Sec. 419A(f)(6) Plans;" and on such date published and communicated in interoffice correspondence to NEW YORK LIFE executive Louis P. Gilbert and other NEW YORK LIFE executives that the author "argues that the **non-VEBA severance pay plan is vulnerable to two attacks: (1) the "unanticipated" event triggering severance is actually one that is manipulated (and he cites as an example**

of this a method endorsed in STEP's illustrations – the use of restrictive employment contracts); and (ii) because he maintains there is a substantial likelihood of plan termination, the IRS can recharacterize the plan as one of deferred compensation."

134. In response to the aforesaid professional journal article, and knowing its potentially damaging effect on NEW YORK LIFE, on November 6, 1996, to further its conspiracy of silence and misinformation to Employers and Employees in STEP, Kaplin communicated to Gilbert and other NEW YORK LIFE executives: "As you know, the Company has thrown substantial money and a good measure of its reputation into the marketing of STEP, a non-VEBA severance pay and death benefit plan. . . . If we approve [the author's article as part of NEW YORK LIFE marketing materials of an alternative plan] . . . we would be undercutting our existing STEP-certified agents, undermining our own marketing efforts with respect to STEP, and inviting lawsuits from the STEP certified agents and the STEP vendor."

135. In the November 6, 1996 NEW YORK LIFE corporate memo, circulated via facsimile and mail to its agents, employees, and officers, NEW YORK LIFE recognized that the STEP PLAN's termination events could be viewed as deferred compensation, but disapproved the sale of other welfare plans stating that marketing and allowing the sale of other products "would be undercutting our existing STEP-certified agents and inviting law suits from the STEP-certified agents and the STEP-vendor."

136. Plaintiffs discovered the aforesaid communication from Kaplan to Gilbert in October 2003.

137. Defendant NEW YORK LIFE, and the other Defendants, intentionally concealed this and other similar communications from the Plaintiffs and Class Members.

138. In a letter, Jeffrey Mamorsky, Esquire, counsel for the STEP Trust, advised that it had come to the attention of the Defendants that insurance agents associated with Defendants were, in fact, engaging in the deceptive conduct referred to by Kaplin.

139. STEP was not a bona fide severance plan, it was not a welfare plan, and was, therefore a pension plan for purposes of ERSIA.

140. STEP was not administered or operated in accordance with the rules governing employee pension plans under the Internal Revenue Code or ERISA.

141. None of the Defendants communicated to Employers or Employees that STEP was a pension plan and did not communicate accurate material information in any of the Summary Plan Descriptions or other communications that were distributed to Employers for the benefit of Employees.

142. The defective Summary Plan Descriptions and communications were distributed to Employers by the Defendants on or about the dates aforesaid by the use of the U.S. Mails during the period 1992 to the present.

143. In a July 23, 1999 letter from HARTFORD to STEP PLAN participant Dr. Michael Bearb, Marc Burchman specifically misrepresented and described funds held in Dr. Bearb's employer STEP PLAN and segregated the employer amounts as being in a separate "investment portfolio" which is counter to the STEP PLAN claim of being "an undivided and unweighted pool".

144. In a February 20, 2001 letter from HARTFORD to STEP PLAN participant Dr. Michael Bearb, Marc Burchman further misrepresented that funds held in the STEP PLAN could not be reached by creditors. The letter also referred to Patrick Smith, as the in-house STEP specialist in the HARTFORD home office.

145. HARTFORD knew or should have known that the STEP PLAN funds were not completely creditor proof and could be reached by a QDRO and/or other creditors in certain jurisdictions.

146. In various conversations in 1995, MURPHY told S&D that all S&D partners could always get their money from the S&D STEP PLAN.

147. MURPHY and PRUDENTIAL knew or should have known that there would have to be a deviation from the plan documents for this easy withdrawal to happen.

148. MURPHY and PRUDENTIAL actively marketed the easy withdrawal from the STEP Plans to owner-employee and others in the class.

149. As part of the common methodology of marketing STEP, the INSURANCE COMPANIES, along with their agents and the other defendants, at no time represented to plaintiffs that investments other than variable life insurance could or should be used to fund the severance benefits to be provided by the STEP arrangement; or, if any of the class of plaintiffs inquired of alternative investments, the defendants through their agents at the point of sale, dissuaded plaintiffs from purchasing annuities, municipal bonds, or other types of investments that could be free of taxation or prevent the dissipation of principal contemplated by defendants.

150. Despite their knowledge of the defective premises of STEP and the aforesaid misrepresentations and intentional omissions of material information in the period 1992 to the present, the Defendants continued to benefit financially from the collection of insurance premiums and other fees, charges, and assessments from the Employers and plan assets, and violated various state and federal laws as articulated in this Complaint, and failed to fulfill their duties to the Employers and Employees imposed by ERISA and/or the common law.

151. The INSURANCE COMPANIES and their agents through their actions directly participated in the STEP scheme and their actions directed the actions of the STEP scheme and induced employers into the STEP scheme.

152. In violations of their respective duties of good faith and fair dealing, the defendants at no time recommended that any death benefit provided by STEP could be

more efficiently provided with term insurance, instead of more expensive permanent life insurance.

153. The defendants, including MURPHY, failed to suggest term insurance, annuities, or investments other than life insurance because life insurance paid commissions to them many times greater than could be obtained by funding plaintiffs' plans with other more prudent and suitable investment vehicles.

154. The defendants, individually, and in collusion with each other, pressed employers who adopted the STEP documents to purchase life insurance for their respective plans although the defendants knew or should have known that such investments were imprudent or unsuitable for the type of plan STEP was supposed to be.

155. As a direct and proximate result of the intentional and negligent misrepresentations of the defendants aforesaid [including the failure to recommend alternatives], the defendants caused the STEP trustee to purchase unsuitable and imprudent investments for each of the STEP arrangements, and thereafter caused each STEP PLAN to suffer substantial loss of principal, earnings, and benefits.

STEP IS AN UNLICENSED INSURANCE COMPANY

156. STEP, the PROMOTERS, and administrators are subject to regulation by the Illinois Insurance Department and the various other state insurance departments as they are providing or marketing a form of insurance.

157. State regulation of insurance is an important public policy concern to prevent frauds and unpaid claims.

158. STEP was purported to be a multiple-employer welfare arrangement through the vehicle of a trust.

159. STEP is, therefore, regulatable by each state's insurance code and laws, including its state of promotion (Pennsylvania and Illinois), its choice of law state (New York), its state of administration (Connecticut), and the state of each promotion and sale for each employer plan (listed in the Form 5500s).

160. The degree of state insurance regulation is unlimited as STEP's promised benefits are not fully-insured by an entity subject to regulation and licensed by the various states Insurance Departments.

161. STEP purports to provide severance benefits on account of "severance events", and such benefits are measured by reference to New York State Unemployment Insurance law.

162. The STEP severance and disability benefit involves transfer of risk onto the STEP trust, and the spreading of risk among the participants in STEP.

163. "Premiums" are paid for the STEP severance/supplemental unemployment insurance and disability benefit by employers. STEP is obviously operated as a profit-making venture for the promoters, and the STEP plan can profit if collections are greater than payments.

164. Accordingly, STEP demonstrates the historical characteristics of insurance and the business of insurance under the tests of the Supreme Court, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-212 (1979); *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 73 (1959).

165. The severance and disability insurance provided by STEP are not insured by any contract of indemnity from any commercial, regulated insurance company.

166. The STEP severance and disability benefits are to be funded only from cash surrender values in life insurance contracts.

167. Since no insurance company is liable to pay on account of a severance and disability event, the STEP severance and disability benefit is not fully-insured.

168. STEP is in substance, a self-funded multiple employer plan.

169. The STEP PLAN consists of life insurance policies that insure against the risk of death, not unemployment or severance or disability.

170. Self-funded, unlicensed insurance arrangements are illegal in all states, including New York, Connecticut, Pennsylvania and Illinois.

171. Due to the uninsured nature of the STEP severance benefits, the status of STEP is an illegal unregulated insurance company.

172. The STEP trust is a de facto insurance company and the persons involved with the promotion and operation of STEP, as well as the STEP trust, are covered by the various state insurance codes and law.

173. The operations of STEP are and have been illegal under the various state insurance law and code, during the participation of S&D, the S&D STEP PLAN, and the class as a whole.

174. At no time did the ADMINISTRATIVE FIDUCIARY DEFENDANTS, the PROMOTERS, or the INSURANCE COMPANIES warn any employer that the STEP Plan concept was a multiple employer welfare arrangement ("MEWA") as described in ERISA section 514, and that as such, it was potentially subject to regulation as an insurance company by States if benefits were not fully-insured.

STEP EVOLVES AND BEGINS TO DISINTEGRATE

175. In 1997, MELLON assumed the role of Trustee of the STEP PLANS.

176. Sometime in 1997, STEP, Inc., a corporation with an address at 225 Oser Ave., Hauppage, NY 11788, became the new Plan Sponsor. (Ex. "D").

177. It appears that sometime after 1996, US TRUST resigned. At no time, however, were employers given the chance to vote on the selection of the successor Plan Sponsor when US TRUST resigned.

178. Sec. 8.6(a) of the original STEP PLAN Document required a 60 day written notice to the employers

if a Plan Sponsor wished to resign. Section 8.6(b) required a 70% vote of employers to confirm a suitable successor Plan Sponsor ("70% vote").

179. S&D, and the other employers who had adopted a STEP PLAN, received no notice of US TRUST resigning, and did not have the opportunity to vote on STEP, Inc.

180. Upon information and belief, US TRUST, TEPLITZKY, and other parties, conspired to unilaterally change the Plan Document without notice to the employer sponsors.

181. In furtherance of their own interests, US TRUST, TEPLITZKY and other parties changed the fundamental intent of the STEP PLAN Document, in direct contradiction to the STEP PLAN'S purposes and preamble, by deleting the Sec. 8.6 requirements.

182. The deletion of the 70% vote was a material change to the STEP PLAN Documents.

183. The deletion of the 70% vote was a change implemented in the own self-interest and for the gain only of TEPLITZKY and others who were deriving fees, commissions, and other revenue from STEP PLANS.

184. The deletion of the 70% vote was against the best interest of the STEP PLAN employer sponsors, beneficiaries, and Participants as that change removed any ability of employers to protect participants from unsuitable fiduciaries.

185. US TRUST breached its duty when it knew or should have known that a shell corporation, STEP INC, controlled by Ken Katz and or TEPLITZKY, was an unsuitable replacement sponsor and then allowed the amendment of the STEP plan to take place to deprive Employers of valuable voting rights and Employees of valuable protections inherent in those rights.

186. It was patently unreasonable for US TRUST to believe that a shell corporation like STEP Inc. was a suitable replacement for a multi-billion regulated entity like US TRUST, and it was patently unreasonable and harmful for US TRUST to engage or consent to any conduct that would deprive the Employers and Employees of the benefit of their bargain -- their voting rights that effectively controlled sponsor selection.

187. It was a breach by MELLON, similarly, not to have inquired as to whether it was properly appointed, whether US TRUST properly resigned, whether the plan should have been terminated, or whether STEP, INC. TEPLITSKY and the INSURANCE COMPANIES and their agents had engaged in acts that deviated from the plan documents to the detriment of the Employers or Employees.

188. US TRUST breached its fiduciary duty upon the turnover of plan assets and the sponsor position to STEP INC.

189. US TRUST engaged in a continuing concealment of its failure to exercise its fiduciary responsibility, by allowing the turnover of sponsorship to STEP Inc and

failure to terminate the plan pursuant to the plan documents, until it was discovered by S&D in late 2002.

190. In late 1997, TEPLITZKY and MELLON caused the new STEP PLAN Document to be mailed to all participating employers for each STEP PLAN; but TEPLITZKY and MELLON did not highlight or describe the changes to the STEP PLAN Documents or the illegal impact of the changes.

191. It appears, therefore, that STEP, Inc., and/or STEP SERVICES were never validly confirmed as sponsor.[5]

192. The material change in the 70% requirement turned the PLAN from a possible MEWA (controlled by employers) to a trust under only the control of TEPLITZKY and STEP, Inc.

THE BENISTAR SCHEME TO LOOT THE STEP PLANS

193. Upon information and belief, the BENISTAR ENTITIES became affiliated with the STEP PLANS at the behest and action of TEPLITZKY.

194. Upon information and belief, BENISTAR, STEP SERVICES, and/or its affiliates paid TEPLITZKY a substantial sum to take over administration of the STEP PLANS and ownership of the Plan Sponsor.

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[5] In accordance with the Plan Documents, the Plan should have been terminated at this point.

195. Upon information and belief, BENISTAR, STEP SERVICES, BENISTAR ADMIN, BURSEY, and CARPENTER became Administrator and Sponsor of the STEP PLANS with the intention of looting the STEP PLANS' assets, directly or indirectly, by creating a mandatory termination event for all STEP PLAN employers.

196. BENISTAR and/or its affiliates are also in the business of operating a purported section 419A(f)(6) arrangement funded with life insurance policies ("BENISTAR 419 Plan").

197. BENISTAR and/or its affiliates and/or its principals, including CARPENTER and BURSEY, directly or indirectly receive insurance commissions when insurance policies are placed in the BENISTAR 419 Plan.

198. BENISTAR, STEP SERVICES, BENISTAR ADMIN, CARPENTER, and BURSEY are on notice that the BENISTAR 419 Plan does not comply with section 419A(f)(6) under said Proposed Regulations, or under IRS Private Letter Ruling 200127047.

199. Moreover, BENISTAR, STEP SERVICES, BENISTAR ADMIN, and CARPENTER were on notice that under the Tax Court decisions of *Grant-Jacoby, Inc. v. Commissioner*, 73 T.C. 700 (1980) and *Neonatology Assoc., P.C. v. Commissioner*, 115 T.C. 43 (2000), *aff'd*, 293 F.3d 128 (3d Cir. 2002), the BENISTAR 419 Plan is not a welfare benefit Plan for tax purposes because it is designed to discriminate against participation of non-owner employees and serves no valid welfare purpose.

200. In 2001, S&D contacted the S&D STEP PLAN Administrator, TEPLITZKY, about a withdrawal or freeze of contributions. Shortly after that time, a new entity came on the scene: STEP SERVICES and BENISTAR ADMIN, affiliates of BENISTAR. (Ex. "G").

201. BENISTAR, BENISTAR ADMIN, and STEP SERVICES are controlled by CARPENTER, and BURSEY is a figurehead controlled by CARPENTER.

202. On February 19, 2002, BURSEY on behalf of BENISTAR, BENISTAR ADMIN, and STEP SERVICES contacted S&D and each employer with a STEP PLAN by letter sent via U.S. mail. (Ex. "G" and "H").

203. BURSEY disclosed that the "BENISTAR family" was the new STEP Plan Administrator. *Id.*

204. BENISTAR and STEP SERVICES offered to borrow money from the STEP policies (on the lives of Participants) and deposit them into a new section 419A(f)(6) Plan administered and controlled by their corporate affiliates, the BENISTAR 419 PLAN. *Id.*

205. On or about June 20, 2002, BURSEY and BENISTAR did cause, by mail, letters to be sent to all participating employers with STEP PLANS stating that BENISTAR and STEP SERVICES would unilaterally allow termination, impose a termination assessment of 20% of plan assets and pay only 80% of the calculated benefit if employers did not take its offer to "rollover" to the new BENISTAR 419 Plan. If employers chose to rollover to the BENISTAR

419 Plan, an assessment of 10% would be charged. No reason for the difference in percentages was given. *Id.*

206. BENISTAR and STEP SERVICES were purportedly going to unilaterally reduce severance benefits to cover an unspecified "Plan deficit." Such an action constitutes prohibited experience rating under the holding of *Booth v. Commissioner*, 108 T.C. 524 (1997).

207. In connection with their scheme, BENISTAR, BENISTAR ADMIN, STEP SERVICES, BURSEY, and CARPENTER anticipated that they would be able to divert to their own use a substantial amount of each STEP PLAN'S assets by demanding 20% or 10% of the assets attributable to each employer's participation.

208. BENISTAR, BENISTAR ADMIN, STEP SERVICES, BURSEY, and CARPENTER plotted that by offering owner-employers a way to get at money otherwise held in the STEP PLANS and otherwise available under the Plan documents, the employers would consent to give up 10 or 20 percent of cash values of their respective employer STEP PLAN.

209. If employers took the least costly option, rollover to the BENISTAR 419 Plan, BURSEY, CARPENTER, STEP SERVICES, BENISTAR ADMIN and/or BENISTAR would generate directly or indirectly insurance commissions on the churning of policies to the BENISTAR 419 Plan. Future administration and other fees with respect to the BENISTAR 419 Plan would also be generated. Out of the $40,000,000 of cash and cash value, under the scheme BURSEY, CARPENTER, STEP SERVICES, and

BENISTAR sought to divert between $4,000,000 [10%] and $8,000,000 [20%] away from the STEP PLANS Participants.

210. In addition, upon information and belief, BENISTAR, BURSEY, CARPENTER and/or their corporate affiliates arranged "guaranteed issue insurance" arrangements with an unnamed insurance company. If successful, BENISTAR, BURSEY, CARPENTER and/or their corporate affiliates would earn commissions and/or other compensation on at least $30,000,000 of new insurance premiums.

211. Even at a 5% commission, the BENISTAR "affiliates," "Fiduciaries" and/or agents appeared poised to earn at least $1,500,000 in new insurance commissions from the STEP PLAN assets. BENISTAR and STEP SERVICES attempted to coerce S&D and, on information and belief, similarly situated employee sponsors and employees to accept the dissipation of 20% of assets for employees, or suffer a 10% reduction and agree to transfer those assets to the BENISTAR 419 Plan, or suffer other adverse consequences.

212. BENISTAR, BENISTAR ADMIN and STEP SERVICES did not use reasonable means to make such assessments, and rather, BENISTAR constructed these assessments with the intention of coercing employers to adopt the BENISTAR 419 Plan.

213. BENISTAR, BENISTAR ADMIN, STEP SERVICES, BURSEY and CARPENTER knew that they or their corporate affiliates would derive additional insurance commissions, administration fees and other revenue by creating an economic detriment for those employers who did not elect these options.

214. BENISTAR, STEP SERVICES, BURSEY and CARPENTER knew or should have known that these options deviated in material respect from the STEP Plan and Trust documents.

215. At no time did BENISTAR, STEP SERVICES, BURSEY or CARPENTER offer to co-operate with employers in any other fashion, although other alternatives were available; and such failure to co-operate occurred because BENISTAR, BURSEY, STEP SERVICES, or CARPENTER could not personally profit from offering other alternatives, like the one demanded by S&D.

216. After receiving the aforesaid notices, S&D informed BENISTAR, STEP SERVICES, BURSEY and CARPENTER that it accepted none of the alternatives offered by BENISTAR. (Ex. "H").

217. S&D demanded that the share of STEP PLANS' assets attributable to its employees be transferred to Community Trust Company, as the new Trustee of a welfare Plan S&D intended to establish. (Ex. "H").

218. As punishment for S&D demanding transfer of its Plan assets to another Plan, instead of the BENISTAR 419 Plan, on or about September 25, 2002 STEP SERVICES initiated litigation against S&D and its attorney John Koresko stating that by S&D's sending a cease and desist letter to BENISTAR and questioning its practices in said letter, S&D and its attorney had defamed BENISTAR and by its questions constructively withdrawn from the STEP PLAN so that all S&D STEP PLAN plan assets were forfeited to BENISTAR. STEP PLAN Services, Inc. v. Koresko & As

sociates, John J. Koresko, V and Sanchez & Daniels, No. 02-CV-1711, District of Connecticut ("Connecticut action").

219. The original complaint and other pleadings in the Connecticut Action were sent via mail.

220. BENISTAR and its affiliates, including CARPENTER and BURSEY, threatened to dissipate the assets attributable to the S&D employees, and to discriminate against S&D employees as of December 2, 2002. (Ex. "H").

221. BENISTAR and its affiliates, including CARPENTER and BURSEY, have threatened other employers who have questioned their administration by BENISTAR of their welfare benefit plans.

222. On or about September 29, 2003 in a September 29, 2003 dated press release drafted by the BENISTAR ENTITIES and sent via email through interstate and intrastate telephone connections to all participating employers, BENISTAR misrepresented that last week Judge Davis in Pennsylvania dismissed the Arrow Drilling case and awarded Benistar attorneys' fees and costs. BENISTAR further stated that the Arrow Drilling case was a carbon copy of another baseless action, that Judge Davis had dismissed as well. The press release did not state that this action was still pending and did not refer to the Massachusetts Action.

223. In a September 30, 2003 letter to SANCHEZ, the BENISTAR ENTITIES attorney Jack E. Robinson misrepresented "last week Judge Davis in Pennsylvania dismissed the Arrow Drilling case and awarded Benistar attorneys' fees and costs." Jack E. Robinson then further

threatened SANZCHEZ by stating: "And like Arrow Drilling, S&D will end up paying dearly for being in league with them."

224. BENISTAR and Robinson knew these statements to be false as Judge Davis has not dismissed the Arrow Drilling case with prejudice and has not awarded attorney's fees and costs.

MASSACHUSETTS ACTION: BENISTAR AND ITS RELATED COMPANIES ARE SHAM CORPORATIONS CONTROLLED BY CARPENTER

225. At the time of the transfer of the STEP PLANS to BENISTAR, BENISTAR, BURSEY, and/or CARPENTER never disclosed to any employer or employee/participant of the STEP PLANS that a BENISTAR affiliate and CARPENTER had been accused and was guilty of misappropriation of trust escrow funds and that the BENISTAR ENTITIES were sham corporations controlled by CARPENTER.

226. On September 23, 2003, the Superior Court of Massachusetts decided phase II and III of Gail Cahaly, et al. ("Mass. Plaintiffs") v. Benistar Prop. Exchange Trust Co., Inc ("Benistar Property"); Molly Carpenter; Daniel Carpenter; Benistar Admin. Services, Inc. ("BASI"); Jane Doe Affiliates and Subsidiaries of Benistar Defendants and Jane

Doe Entities controlled by Daniel Carpenter (including Benistar Ltd.[6]; Carpenter Financial Group; Benistar Employer Services Trust Corp. (BESTCO)); Civ. No. 01-0116BLS2, Slip Op. Sept. 23, 2003.

227. In Phase I, a jury returned verdicts against Benistar Property and CARPENTER on claims of breach of fiduciary duty, conversion, and intentional misrepresentations, and Molly Carpenter on a claim of breach of fiduciary duty for misappropriation of over $8 million of trust escrow proceeds. (Slip. Op. Phase II at 1-2, Ex "K").[7]

228. In Phase II, the Court awarded double damages in the amount of $17,288,300 for a total judgment of $25,952,450 (plus interest, costs, and attorney's fees). Id.

229. In Phase III, the Massachusetts court disregarded the corporate form expanding liability for the $25,952,450 to all the BENISTAR entities, including Carpenter Financial Group, BASI, BESTCO, and Benistar Ltd. ("Mass. Phase III Defendants"). (Slip Op. Phase III, Ex. "L").

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[6] Benistar Ltd. is the parent company and controls the BENISTAR 419 PLAN and TRUST. Even Defense Counsel's own billing statements highlight this fact. (Defense Counsel Fee Statement, Miller Aff., Ex. "L"). Furthermore, BASI, BESTCO, and CARPENTER are all defendants in this matter

[7] The entirety of the slip opinions is attached and incorporated as if set forth fully herein.

230. At least $2.4 million of the Mass. Plaintiffs' trust funds had been co-mingled in the BESTCO account. Id. at 8.

231. At least another $4 million of large unexplained transfers exist involving BESTCO and BASI. Id. at 9.

232. When asked questions by the Judge, the corporate designees could not answer even basic questions about the corporations. Id. at 5-7.

233. Daniel Carpenter refused to answer questions, asserting his Fifth Amendment rights. (Phase II Slip Op. at 3; Phase III Slip Op. at 12-13).

234. Benistar LTD. is the parent company of the Benistar 419 Plan & Trust and the other BENISTAR entities appear to be subsidiaries. (Phase III Slip Op. at 3).

235. Of further notes:

a) Daniel Carpenter in total or in part with Molly Carpenter owns BENISTAR LTD., BESTCO, and BASI. (Phase III Slip Op. at 12).

b) Daniel Carpenter, along with Molly Carpenter, exerts dominion and control over Benistar Ltd., BESTCO, and BASI. (Phase III Slip Op. at 13).

c) Confused intermingling of the business activity assets and management exists amongst Benistar Ltd., BESTCO, and BASI. (Phase III Slip Op. at 13-14).

d) The Mass. Phase III Defendant companies including Benistar Ltd., BESTCO, and BASI were inadequately capitalized for the conduct of legitimate business. (Phase III Slip Op. at 14-15).

e) The Mass. Phase III Defendants including Benistar Ltd., BESTCO, and BASI did not observe corporate formalities, lacked corporate records, and did not pay dividends. (Phase III Slip Op. at 15-16).

f) The only true corporate officers of Benistar Ltd., BESTCO, and BASI are Daniel and/or Molly Carpenter. (Phase III Slip Op. at 16).

g) Daniel and Molly Carpenter used the trust funds from Benistar entities, "as a source of funds to support Daniel's personal penchant for risky options trading on the stock market", sufficiently to demonstrate use of the corporations for transactions of the dominant shareholders. (Phase III Slip Op. at 16).

h) By their actions BESTCO, BASI, CFI, and Benistar Ltd. promoted fraud and were used to promote fraud. (Phase III Slip Op. at 16- 17).

236. Accordingly, the Massachusetts court disregarded the corporate forms and expanded the judgment "to provide a meaningful remedy and avoid injustice in this case."

237. The BENISTAR ENTITIES are liable for the total judgment of $25,952,450 (plus interest, costs, and attorney's fees). *Id.*

238. BENISTAR, BURSEY, and/or CARPENTER have refused to disclose whether any BENISTAR, related BENISTAR entities, and/or directors' & officers' insurance and/or bonding has been affected by the Massachusetts verdict against CARPENTER and the misappropriation of trust escrow funds.

239. Upon information and belief due to the Massachusetts's Action, BENISTAR, related BENISTAR Entities, and/or directors' & officers' insurance and/or bonding has been revoked.

240. TEPLITZKY and the other STEP PLAN Fiduciaries willfully and knowingly failed to exercise proper fiduciary duty on behalf of the STEP PLANS Participants, and willfully and knowingly failed to investigate the true motives of BENISTAR, STEP SERVICES, BENISTAR ADMIN, BURSEY, and CARPENTER, because they were either receiving compensation or because they were negligent.

241. If the STEP PLANS employers or participants had known about the Massachusetts's Action, the STEP employers and participants would not have allowed the transfer of the STEP PLANS to the control of CARPENTER.

242. If the STEP PLANS employers had known about the Massachusetts's Action, the STEP employers would not have allowed the transfer of the STEP PLANS to the BENISTAR 419 PLANS or any of the BENISTAR ENTITIES.

INVESTMENT OF PLAN ASSETS

243. The majority, if not the all, of the insurance policies of STEP were invested in variable life insurance policies. ("STEP Policies").

244. Each of the INSURANCE COMPANIES held STEP Policies.

245. The amounts paid into the STEP Policies were not held in the general account of the INSURANCE COMPANIES.

246. The amounts of the STEP Policies were allocated to various sub-accounts in the nature of mutual funds. The subject variable life policies were constructed this way so that the cash surrender value of the plan is related to the stock market, rather than the conservative investments of the INSURANCE COMPANIES.

247. The INSURANCE COMPANIES pick the fund managers for the variable accounts.

248. The INSURANCE COMPANIES have discretion as to adjustment of expenses, mortality charges, and other loads.

249. The INSURANCE COMPANIES knew that the STEP Policies were variable insurance and could be subjected to market swings.

250. The INSURANCE COMPANIES knew or should have known that variable life insurance policies were not the best investment vehicles for severance benefits, such

as those offered by STEP and marketed as such by the INSURANCE COMPANIES.

251. The INSURANCE COMPANIES knew or should have known that annuities or other tax-exempt vehicles could have been chosen and were more reliable investment choices for the purpose of the plan -- paying severance benefits.

252. The INSURANCE COMPANIES and their agents who sold insurance to STEP did so for one primary reason, to obtain inflated commissions and profits at the expense of STEP Plan participants.

253. When the stock market went down in recent years , the INSURANCE COMPANIES, their agents, and the ADMINISTRATIVE DEFENDANTS failed to allocate the insurance contracts away from the variable accounts into the safer option, the fixed accounts.

254. As a result, the values of the STEP plan assets attributable to the plaintiffs declined substantially.

255. The INSURANCE COMPANIES, their agents, and the ADMINISTRATIVE DEFENDANTS had the ability to cause allocation of the amounts in the STEP Policies and did nothing.

256. The INSURANCE COMPANIES, their agents, and the ADMINISTRATIVE DEFENDANTS knew or should have known that STEP was not fully-insuring its claims and was therefore a MEWA, a de facto insurance company, subject to state insurance regulation.

257. The INSURANCE COMPANIES, their agents, and the ADMINISTRATIVE DEFENDANTS knew or should have known that they were promoting the operations of an unlicensed insurance carrier.

258. Each of the INSURANCE COMPANIES, their agents, and the ADMINISTRATIVE DEFENDANTS participated in activities to promote the activities of STEP.

259. The INSURANCE COMPANIES, their agents, and the ADMINISTRATIVE DEFENDANTS dominated the design of the plans and limited the investment choices available to the employer plaintiffs.

260. Large commissions and profits are involved in certain types of life insurance, as reflected in the STEP IRS Form 5500s attached hereto.

DEMUTUALIZATION PROCEEDS

261. During the class period, PRUDENTIAL, METLIFE, and other insurance carriers offered and paid to TEPLITSKY, STEP SERVICES, MELLON, BENISTAR, and/or other STEP PLANS Fiduciaries demutualization proceeds on policies held by or on behalf of the STEP PLAN trusts.

262. The demutualization proceeds were STEP PLANS assets.

263. In early 2001, PRUDENTIAL published and circulated to group contract holders and policyholders: "PRUDENTIAL'S PLAN TO DEMUTUALIZE".

264. In "PRUDENTIAL'S PLAN TO DEMUTUALIZE", PRUDENTIAL specifically recognized the duty to safeguard the demutualization proceeds as ERISA plan assets noting that fiduciaries could be held personally liable for the improper use and payment of the demutualization proceeds and stating: "if the compensation is a plan asset, it must be used within the ERISA Plan to pay benefits or expense."

265. In "PRUDENTIAL'S PLAN TO DEMUTUALIZE", PRUDENTIAL further noted that multiple employer programs including association plans present special issues: "Thus if an association holds a group policy on behalf of a employee benefit plans established by its members, its actions may be subject to ERISA's fiduciary rules described below and subject to ERISA's fiduciary rules described below and subject to enforcement by its members and employers."

266. PRUDENTIAL and METLIFE could have credited the demutualization proceeds to the various policies in the STEP PLANS.

267. Upon information and belief, the demutualization proceeds were not credited to the STEP PLANS.

268. PRUDENTIAL and METLIFE knew that paying the demutualization proceeds to others than the respective STEP PLANS was improper under ERISA and illegal.

269. PRUDENTIAL and METLIFE did not notify the respective employers or participants of each STEP PLAN as listed on the IRS Forms 5500s.

270. PRUDENTIAL and METLIFE willfully and directly participated in the payment of demutualization proceeds to improper persons and to persons other than the participants and beneficiaries of the STEP PLANS.

271. Upon information and belief, TEPLITZKY, BENISTAR ENTITIES, STEP SERVICES, CARPENTER and/or BURSEY willfully abstracted the demutualization proceeds for their own use or for the use of persons other than the participants and beneficiaries of the STEP PLANS.

THE IRS ATTACKED THE STEP PLAN CONCEPT

272. On or before March 31, 1997, the Internal Revenue Service ("IRS") audited the tax return of Coastal Neurological Surgery Medical Group ("Coastal"), a California corporation.

273. Prior to the audit, Coastal was an employer whose employees participated in a STEP PLAN.

274. In the years 1992 through 1998, Coastal took federal tax deductions for contributions to a STEP PLAN, relying on the representation of the PROMOTERS that it was a Plan described in section 419A(f)(6).

275. The IRS took the position that a STEP PLAN was not a Plan described in Section 419A(f)(6) and disallowed all deductions taken by Coastal.

276. STEP and LEVY tried to convince the employer in Coastal to concede the deduction and allow STEP to pay any taxes, penalties, and interest. The employer in Coastal would not agree.

277. On March 31, 1997, Coastal filed a petition in the United States Tax Court (Docket No. 6153-97) to contest the determination of the IRS.

278. In one or more of the years 1997 through 2001, in connection with said Tax Court case, TEPLITZKY, STEP SERVICES and/or BENISTAR provided funds from the assets of the STEP PLANS to fund the Tax Court litigation conducted by Coastal; and counsel and/or the Administrator for the STEP PLANS provided services in connection with said litigation and/or were subpoenaed to testify.

279. On February 6, 2001, the Honorable David Laro, Judge of the United States Tax Court, accepted the Stipulation[8] of the parties wherein:

(a) approximately 75 percent of the deductions claimed by Coastal were disallowed for the years in question;

(b) the parties stipulated to the assessment of penalties under IRC § 6662(a) and as applicable § 6651(a)(1), in addition to statutory interest; and

(c) the Coastal employees in the Coastal STEP Plan were charged with additional taxable income, penalties and interest.

280. Under the Stipulation, the parties agreed that the Coastal STEP Plan was not a Plan described in Section

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[8] A true and correct copy of the stipulation is attached hereto as Exhibit "I".

419A(f)(6) of the Internal Revenue Code, and that no deduction would be permitted by Coastal in the future for the amounts disallowed or ultimately paid out of the Coastal STEP Plan.

281. At all relevant times, the INSURANCE COMPANIES, TEPLITZKY, BENISTAR ADMIN, STEP SERVICES, BURSEY, CARPENTER, US TRUST, MELLON and BENISTAR were on notice of the Tax Court litigation, and intentionally failed to notify employers and employees involved in the STEP program (i) of the IRS claims concerning the STEP PLANS before and after the beginning of the litigation, (ii) the position of the ADMINISTRATIVE DEFENDANTS to concede the tax deduction, and (iii) the stipulation, the loss of deductions, assessment of penalties and interest suffered by Coastal STEP Plan as a result of the litigation.

282. At all relevant times, the participation of S&D and other employers involved in the STEP PLANS programs were induced by representations made by the Fiduciaries and promoters of the STEP Plan (including all defendants) that it was a Plan described in Section 419A(f)(6) of the IRC, that all contributions would be deductible, and that no penalties would be assessed in the event of disallowance of deduction. These representations were contrived in the marketing materials described supra.

283. Notwithstanding the result suffered by Coastal, STEP SERVICES and the Defendants continued to promote and accept contributions and fees from S&D and other employers on account of STEP "benefits."

284. At all relevant times, STEP SERVICES, PROMOTERS, INSURANCE COMPANIES, ADMINISTRATIVE DEFENDANTS, and the other defendants knew or should have known that a principal purpose of employers contributing to each STEP Plan was the attainment for themselves of the federal income tax results denied to Coastal.

285. At all relevant times, the STEP SERVICES, PROMOTERS, INSURANCE COMPANIES, ADMINISTRATIVE DEFENDANTS, and the other defendants knew or should have known that a principal purpose of employers contributing to each STEP Plan was the attainment for employees of the federal income tax results denied to Coastal employees.

286. If S&D and, on information and belief, the similarly situated employer sponsors had known about the IRS attack and Stipulation involved in Coastal or the Defendants' intent to simply concede the employer tax deduction as taken by Coastal to prevent adverse publicity of their deeds and of the STEP scheme, S&D and, on information and belief, the similarly situated employer sponsors would have rescinded its participation in STEP Plan and not stayed in the STEP Plan or become subject to the actions taken by BENISTAR, STEP SERVICES, BENISTAR ADMIN, CARPENTER and BURSEY.

287. On information and belief, TEPLITZKY and others associated with STEP, using the STEP PLANS plan assets, paid a sum to Coastal and/or its officers to be silent about the outcome in the tax court and a financial settlement of claims similar to those asserted herein.

288. On July 11, 2002, the IRS issued Proposed Regulations under IRC section 419A(f)(6). Under said Proposed Regulations and as finalized, a Plan like a STEP Plan is not described in section 419A(f)(6).

COUNT I

VIOLATION OF ALL STATES' INSURANCE STATUTES REGARDING UNLICENSED INSURANCE COMPANIES AGAINST ALL DEFENDANTS

289. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

290. The Defendants willfully agreed to and assisted each other in the marketing and promotion of the STEP PLAN and the insurance policies provided as part of the scheme to market STEP.

291. The STEP PLAN consists of life insurance policies that insure against the risk of death, not unemployment or severance or disability.

292. Self-funded, unlicensed insurance arrangements are illegal in all the states where the STEP PLANS were marketed and sold.

293. The STEP trust is a de facto insurance company and the persons involved with the promotion and operation of STEP, as well as the STEP trust, are covered by the state insurance laws.

294. The operations of STEP are and have been illegal under state insurance law during the participation of S&D, the S&D STEP PLAN, and the class as a whole.

295. The "participant/beneficiaries" of the STEP PLANS face a clear and present danger of dissipation of their benefits and any residual rights they might have.

296. Defendants knew that the scheme was being marketed in a false and deceptive manner, and that the benefits of insurance policies were being misrepresented, and nevertheless took affirmative steps to assist the other Defendants by, among other things, providing misleading representations, including but not limited to the fully insured status, policy representations, tax deductibility representations, and compliance with IRC and ERISA requirements.

297. Defendants willfully assisted and/or aided directly or indirectly in the procurement of the insurance contract and are be liable to the insured for the full amount of the claim or loss as provided in that insurance contract.

298. Defendants actions violated the provisions of the Illinois Insurance Act and the other states' insurance acts as to constitute civil penalties and a crime in certain states.

WHEREFORE, PLAINTIFFS pray that this Court enter judgment in their favor and against DEFENDANTS:

(i) for compensatory damages, together with pre-judgment and post-judgment interest;

(ii) for rescission and punitive damages together with pre-judgment and post-judgment interest;

(iii) for costs of suit;

(iv) for attorneys fees; and

(v) for such other and further relief as the Court may deem just and proper.

COUNT II

BREACHES OF ERISA AND COMMON LAW FIDUCIARY DUTY AGAINST BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR ADMIN, MELLON, INSURANCE COMPANIES, TEPLITZKY

299. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

300. Both common law and ERISA fiduciary duties exist.

301. Under the common law and ERISA, a fiduciary is liable not only for his own fiduciary breaches, but also to use reasonable care to prevent his co-Fiduciaries from breaching their fiduciary duties.

302. Under the common law and ERISA, a Plan fiduciary's duties of loyalty and prudence include a duty to disclose and inform. This duty entails: 1) a negative duty not to misinform; 2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and 3) a duty to convey complete and accurate information material to the circumstances of Participants and beneficiaries.

303. The INSURANCE COMPANIES were fiduciaries pursuant to their discretionary control over the plan assets, the variable life insurance policies.

304. Based upon the foregoing and otherwise in connection with their duties, both common law and pursuant to ERISA, the INSURANCE COMPANIES breached the responsibilities, obligations or duties imposed upon them as fiduciaries pursuant to common law and by ERISA, 29 U.S.C. §§ 1001-1144.

305. During the class period, the INSURANCE COMPANIES violated and their common law and ERISA Fiduciary duty by improperly investing the plan assets in variable contracts and then not properly monitoring the investments and diversifying when the markets began to plummet.

306. The INSURANCE COMPANIES breached their common law and ERISA Fiduciary duty by failing to care for the investments in the STEP plan and failing to assure that the assets of the STEP Plan were being safeguarded by the other defendants consistent with the plan documents and applicable law.

307. The INSURANCE COMPANIES violated their duty to monitor other fiduciaries.

308. During the Class Period, the Defendants INSURANCE COMPANIES, BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR ADMIN, US TRUST, MELLON, and TEPLITZKY breached their fiduciary duties to disclose and inform with respect to the IRS rulings, the

misstatements IRS deductions of the STEP PLANS, and the Plan overall.

309. The fiduciary duty of loyalty also entails a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a Plan with an "eye single" to the interests of the Participants and beneficiaries, regardless of the interests of the Fiduciaries themselves or the Plan sponsor.

310. Defendants BURSEY, CARPENTER, US TRUST, STEP SERVICES, BENISTAR, BENISTAR ADMIN, MELLON, and TEPLITZKY breached their duty to avoid conflicts of interest and to promptly resolve them when they occur by engaging in self dealing.

311. A fiduciary may not avoid his fiduciary responsibilities by relying solely on the language of the Plan documents. While the basic structure of a Plan may be specified, within limits, by the Plan sponsor, the fiduciary may not blindly follow the Plan document if to do so leads to an imprudent result. ERISA § 404(a)(1)(d) (29 U.S.C. § 1104(a)(1)(D)).

312. To the extent that ADMINISTRATIVE FIDUCIARY DEFENDANTS blindly followed the direction of the Plan documents, they further breached their fiduciary duties.

Diversion of Plan Assets

313. The application of resources and assets of the STEP PLANS on behalf of the tax liability and legal claims

of Coastal and its principal was a rebate to the employer in violation of the STEP PLAN documents.

314. The application of the resources of the STEP PLANS on behalf of the tax liability and legal claims of Coastal was an illegal diversion of Plan assets for the benefit of a non-participant, was not in the best interest of Plan Participants, was not a proper administrative expense of the STEP Plan and Trust, and therefore violated the STEP Plan documents and section 406 of ERISA.

315. On information and belief, BENISTAR and other Plan Fiduciaries applied assets of the STEP PLANS in like manner and similarly breached their fiduciary duties to the STEP PLANS and their Participants.

316. The diversion of the demutualization proceeds from the STEP PLANS was a breach of fiduciary duty.

Failure to follow Plan documents

317. In 2001 and 2002, BENISTAR sent various letters to S&D and upon information and belief to other similarly situated employers regarding the "options" BENISTAR unilaterally imposed upon them with respect to their continued participation in their STEP Plan.

318. S&D elected none of the options imposed by BENISTAR, and instead, elected to terminate participation in the S&D STEP PLAN and to have the assets of the S&D STEP PLAN transferred to a welfare benefit Plan created by S&D.

319. S&D made such request in the best interest of Plan Participants, to protect Plan assets, continue benefits under a different Plan, and to prevent taxation to S&D employees.

320. BENISTAR and STEP SERVICES refused to follow the directions of S&D, notwithstanding that such transfers are permitted under the Internal Revenue Code and ERISA, and such transfers are not prohibited by the Plan.

322. BENISTAR and STEP SERVICES failed to follow the directives of S&D, notwithstanding that the Plan Sponsor has the power to group or reorganize the Plan under section 11.2.

323. Defendants BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR INSURANCE, MELLON, US TRUST, and TEPLITZKY as Fiduciaries failed to adhere to the express provisions of the STEP Plan documents.

324. Defendants BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR INSURANCE, US TRUST, and the other STEP Plan Fiduciaries committed the acts complained of herein to increase administration fees and divert Plan assets to their own use, and to generate insurance commissions and other income from the "churning" of STEP Plan assets into the BENISTAR death benefit Plan.

Failure to Terminate Plan or Execute Withdrawal in Accordance with Plan Documents

324. Section 10.4 of the Plan Document provides:

(a) An Employer may withdraw from the Plan at any time . . . . Upon receipt of written notice from an Employer that it has withdrawn from the trust, the Plan Administrator shall identify all of the Withdrawing Employer's Covered Employees.

325. Section 10.6 of the Plan Document provides:

Upon Employer withdrawal pursuant to Section 10.4 or 10.5, the withdrawing Employer has no obligation to fund the Life Insurance Benefit provided in Article V, and any insurance policy in effect at such time shall be distributed, surrendered or maintained in accordance with Section 5.2(h)

326. Section 5.2 (h) of the Plan Document provides that a Covered Employee may purchase a policy owned by the Plan, and further describes a distribution of such policy.

327. Section 10.6 applies the command of section 11.4, distribution to a policy, to an employer withdrawal.

328. Section 11.4 of the Plan Document provides:

(a) The Plan shall terminate upon delivery by the Plan Sponsor to the Trustee of a written and signed notice of termination. Such notice of termination shall be delivered if . . . the Plan fails to satisfy the requirements of Code § 419A(f)(6) . . . or if, due a change in the law one or more of the principal purposes of the Plan, as determined in the exclusive discretion of the Plan Sponsor, can no longer be accomplished.

(b) Upon the Plan's termination . . . the assets will be distributed ratably to each covered employee.

329. Section 5.2 of the Plan Document provides: "In the event the Plan is terminated in accordance with Section 11.4, the Employee's distributive share shall include any insurance owned by the Trustee . . . . "

330. On information and belief, Defendants BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR ADMIN, MELLON, US TRUST, TEPLITZKY and all previous Plan Fiduciaries have deviated from the plain language of the Plan and permitted Employer Withdrawals from the Plan in a manner different from the Plan Documents.

331. On information and belief, Defendants BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR ADMIN, MELLON, US TRUST, and TEPLITZKY and all previous Plan Fiduciaries have deviated from the plain language and distributed insurance policies and cash value to Covered Employees without the reductions demanded.

332. Section 8.6 of the original STEP Plan Document provides that the Plan sponsor may resign, and that a new Plan Sponsor shall be appointed upon acceptance of 70% of Employees.

333. In the event of resignation and failure to appoint a new Plan Sponsor under section 8.6, the Plan Sponsor shall terminate the Plan and distribute pursuant to section 11.4.

334. On information and belief, US TRUST resigned as Plan Sponsor and no successor was appointed by 70% vote of employers.

335. Any amendment to the 70% provision was invalid as a matter of law.

336. On information and belief, each STEP Plan has been in a state of mandatory termination under Plan section 8.6 since before BENISTAR, STEP SERVICES, and their affiliates assumed any role in the Plan.

337. By virtue of the disposition of the Coastal case, a termination event described in Section 11.4 of the Plan Documents occurred prior to the time BENISTAR came to control the STEP PLANS as Plan Administrator.

338. Defendants BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR ADMIN, MELLON, US TRUST, and TEPLITZKY failed to deliver said notice of termination although the Plan Sponsor knew or should have known that the Plan failed to satisfy the requirements of Code § 419A(f)(6) by virtue of the Coastal case and the issuance of the Proposed Regulations.

339. Defendants BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR ADMIN, MELLON, US TRUST, and TEPLITZKY failed to deliver said notice of termination although the Plan Sponsor knew or should have known that the law had changed and that the principal purpose of the Plan could no longer be accomplished, and thereby arbitrarily and capriciously failed to exercise discre-

tion and fiduciary duty in the best interest of Plan Participants.

340. Despite having knowledge of a termination event, MELLON, TEPLITZKY and other Fiduciaries permitted BENISTAR and its affiliates STEP SERVICES, BENISTAR ADMIN, CARPENTER, and BURSEY to take control of the STEP Plans, violate the Plan documents, and make illegal assessments in the context of "terminations" and "withdrawals."

341. Despite having knowledge of multiple termination events, BENISTAR, US TRUST, BENISTAR ADMIN, MELLON, and STEP SERVICES, failed to notify employers of their rights, and those of employees, and failed to properly exercise fiduciary duty, so that BENISTAR, BENISTAR ADMIN, US TRUST, MELLON, and STEP SERVICES could continue to take administration fees and improperly surcharge Plan assets for their own ultimate good.

Failure To Deal With Plan Assets According To Plan Document And Law

342. Section 8.2(a) of the Plan Document only gives the Plan Administrator control over those matters not specifically allocated otherwise under the terms of the Plan.

343. Section 5.2(a) and (b) of the Plan Document specifically provides that the Trustee have full and complete control over any life insurance policy and permanent policy purchased under each STEP Plan.

344. The Plan Document does not give any control over any insurance policy to BENISTAR, BENISTAR ADMIN, STEP SERVICES, or any other Plan Administrator.

345. Under section 8.2 "(a) the Plan Administrator is responsible for (i) applying contributions; (b) approving or denying claims; (c) advising Employers of Covered Employees of their rights and options under the Plan; (d) determining Eligibility of Employee to participate in the Plan; and (v) calculation of benefits."

346. The Plan Documents do not give to BENISTAR, BENISTAR ADMIN, and/or STEP SERVICES any control over calculation or assessment of amounts in the context of a withdrawal or termination from the Plan.

347. Despite having no authority to do so, upon information and belief, BENISTAR, BENISTAR ADMIN, and/or STEP SERVICES have manipulated STEP Plan insurance policies, calculated termination and withdrawal amounts, and otherwise dealt in the insurance assets of the STEP PLANS for its own exclusive benefit and to the detriment of STEP Participants.

348. As a result of the aforesaid, BENISTAR, BENISTAR ADMIN, and/or STEP SERVICES have breached its fiduciary duty to the STEP PLANS and the Plan Participants.

Failure to Act in Best Interests of Plan Participants

349. BENISTAR and STEP SERVICES unilaterally deviated from the terms of each STEP Plan to benefit itself, and demanded that each Plan Employer face either of the following detrimental events:

(a) rollover of STEP Plan assets to the BENISTAR 419 Plan, with a loss of 10% of asset value; or

(b) withdrawal from the STEP Plan, with a loss of 20% of asset value.

350. On information and belief, BENISTAR in conjunction with STEP SERVICES, obtained no actuarial certification or other justification for charging the 10% or 20% hold-backs aforesaid.

351. To justify these demands, and as part of its coercion of employers, BENISTAR in conjunction with STEP SERVICES falsely represented the negative effect of the Proposed Regulations under IRC sec. 419A(f)(6), knowing that such Proposed Regulations are not final and may not be valid at all, and failing to disclose that the Proposed Regulations do not themselves compel the termination of any Plan or transfers to the other BENISTAR Plans.

352. BENISTAR and/or its affiliates are in the business of operating the BENISTAR 419 Plan, a purported section 419A(f)(6) arrangement funded with life insurance policies.

353. BENISTAR and its principals, including CARPENTER and BURSEY, directly or indirectly receive

insurance commissions when insurance policies are placed in the BENISTAR 419 Plan.

354. Upon information and belief, BENISTAR and CARPENTER are both on notice that the BENISTAR 419 Plan does not comply with section 419A(f)(6) under said Proposed Regulations, or under Private Letter Ruling 200127047.

355. Moreover, under the Tax Court decisions of *Grant-Jacoby, Inc. v. Commissioner*, 73 T.C. 700 (1980). (1980) and *Neonatology Assoc., PC v. Commissioner*, 115 TC 115 T.C. 43 (2000), *affirmed* (3rd Cir. 2002), the BENISTAR 419 Plan is not a welfare benefit Plan for tax purposes because it is designed to discriminate against participation of non-owner employees and serves no valid welfare purpose.

356. On information and belief, BENISTAR and STEP SERVICES used the threat of dissipation of each STEP Plan assets to coerce each employer like S&D to adopt the BENISTAR 419 Plan, even though BENISTAR and STEP SERVICES knew or should have known that the amounts threatened to be taken from the STEP PLANS assets were not reasonable or necessary for the payment of benefits from the STEP PLANS.

357. On information and belief, BENISTAR and STEP SERVICES engaged in such actions to generate insurance commissions and additional implementation and administration fees for itself or its affiliates in connection with roll-overs from the STEP PLANS to the BENISTAR 419 Plan.

358. On information and belief, BENISTAR in conjunction with STEP SERVICES has assessed many Employers and Employees in the STEP PLANS such "charges" and generated commissions and fees for itself and its affiliates in violation of its fiduciary duty to such Employers and Participants.

359. On information and belief, by its actions, BENISTAR in conjunction with STEP SERVICES has diverted hundreds of thousands of dollars from the employees participating in the STEP PLANS. BENISTAR, STEP SERVICES, BENISTAR ADMIN, BURSEY and CARPENTER have wrongfully benefited from transactions in connection with the aforesaid.

360. On information and belief, BENISTAR, BENISTAR ADMIN, STEP SERVICES, BURSEY and CARPENTER have additionally breached their fiduciary duties to STEP PLAN Participants and engaged in self-dealing by funneling STEP PLANS assets to the BENISTAR 419 Plan, which BENISTAR and CARPENTER know or should know will not provide the tax effect desired by participating employers or employees.

361. The STEP PLANS suffered a loss, and Plaintiffs and the other Class members were damaged, because of the violation of Defendants' fiduciary duties.

362. By the churning of the STEP PLANS to the BENISTAR 419 PLAN, the BENISTAR ENTITIES have affected the solvency of the STEP PLANS and upon information and belief made the STEP PLANS insolvent.

363. As Fiduciaries, Defendants were responsible for the prudence of investments in the subject STEP Plan during the Class Period unless Participants in each STEP Plan themselves exercised effective and informed control over the assets in the Plan in their individual accounts pursuant to ERISA and the regulations promulgated under it.

364. By investing in only certain types of insurance policies and not modifying the insurance policies in conjunction with financial conditions of 2001 through 2003, Defendants have failed to effectively and prudently manage the Plan assets.

365. By having uninsured risks related to the STEP PLANS, Defendants failed to prudently manage the STEP PLANS.

366. The STEP PLANS also suffered a loss, and Plaintiffs and the other Class members were damaged, by Defendants' above-described conduct during the Class Period, and before, because Defendants' materially deceptive statements, acts and omission were fundamentally designed to deceive Plaintiffs and the other Class members. Where a breach of fiduciary duty consists of, or includes, misrepresentations and omissions material to a decision by a reasonable participant that results in harm to the participant, the participant is presumed as a matter of law to have relied upon such misrepresentations and omissions to his or her detriment. Here, Defendants' above-described statements, acts and omissions constituted misrepresentations and omissions that were fundamentally deceptive concerning the deductibility and tax status of the STEP PLANS and were

material to any reasonable person's decision about whether or not to invest or maintain any part of their Plan assets in each STEP Plan. Plaintiffs and the other Class members are therefore presumed to have relied to their detriment on Defendants' deceptive statements, acts, and omissions.

367. The subject STEP PLANS suffered a loss, and Plaintiffs and the other Class members were damaged, by Defendants' above-described conduct during the Class Period, and before, because that conduct fundamentally deceived Plaintiffs and the other Class members about the prudence of making and maintaining investments in the STEP PLANS. Plaintiffs and the other Class members relied to their detriment upon Defendants' materially deceptive statements, acts and omissions.

368. The subject STEP PLANS suffered a loss due to improper assessment and other charges caused by Defendants' mismanagement and self-benefiting transactions, which were in Defendants' own best interest and not that of the Plan and Plan Participants.

369. ERISA § 502 (a) (2) (29 U.S.C. § 1132(a)(2)) authorizes a Plan participant to bring a civil action for appropriate relief under section 409 (29 U.S.C. § 1109). Section 409 requires "any person who is a fiduciary who breaches any of the duties imposed upon Fiduciaries to make good to such Plan any losses to the Plan." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate."

370. With respect to the calculation of the losses to a Plan, breaches of fiduciary duty result in a presumption

that, but for the breaches of fiduciary duty, the Participants and beneficiaries in the Plan would not have made or maintained their investments in the challenged investment and, where alternative investments were available, that the investments made or maintained in the challenged investment would have instead been made in the most profitable alternative investment available. In this way, the remedy restores the values of the Plan's assets to what they would have been if the Plan had been properly administered and improper assessments had not been made.

WHEREFORE, pursuant to the ERISA breaches of fiduciary duty, PLAINTIFFS and the Class pray that this Court enter judgment in their favor and against DEFENDANTS:

(i) a monetary payment from the Defendants to the Plan to make good to the Plan the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as required by ERISA § 409(a) (29 U.S.C. § 1109(a));

(ii) injunctive and other appropriate equitable relief to remedy the breaches alleged above including rescission of insurance premiums and other amounts paid to defendants, as provided by ERISA §§ 409(a) and 502(a)(2)&(3) (29 U.S.C. §§ 1109(a) and 1132(a)(2)&(3));

(iii) reasonable attorney fees and expenses as provided by ERISA § 502(g) (29 U.S.C. § 1132(g)), the common fund doctrine, and other applicable law;

(iv) taxable costs; and

(v) interest on some or all of these amounts as provided by law.

WHEREFORE, pursuant to the common law breaches of fiduciary duty, PLAINTIFFS and the Class pray that this Court enter judgment in their favor and against DEFENDANTS:

(i) for compensatory damages, together with pre-judgment and post-judgment interest;

(ii) for punitive damages together with pre-judgment and post-judgment interest;

(iii) for costs of suit;

(iv) for attorneys fees; and

(v) for such other and further relief as the Court may deem just and proper.

COUNT III
BREACH OF DUTY OF DUE CARE AGAINST DEFENDANTS MELLON AND TEPLITZKY

371. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

372. BENISTAR and its affiliate STEP SERVICES became associated with the STEP PLANS at the behest and action of TEPLITZKY.

373. TEPLITZKY was Plan Administrator before BENISTAR, and its affiliates.

374. During the relevant period, MELLON was the Trustee of the STEP Plans.

375. MELLON and TEPLITZKY owed a duty to the STEP Employer Sponsors, Plan Participants, and Beneficiaries.

376. On information and belief, BENISTAR, STEP SERVICES, BENISTAR ADMIN, BURSEY, and CARPENTER became associated with STEP and the STEP PLANS with the intention of looting the STEP PLANS assets directly or indirectly.

377. In connection with their scheme, on information and belief, BENISTAR and CARPENTER anticipated that they would be able to divert to their own use a substantial amount of the STEP Plan assets by demanding 20% or 10% of the assets attributable to each employer's participa-

tion, or generating insurance commissions on the churning of policies to the BENISTAR 419 Plan, or generating administration and other fees with respect to the BENISTAR 419 Plan.

378. Prior to the acquisition of control of the STEP PLANS by BENISTAR and its "affiliates," CARPENTER and other BENISTAR "affiliates" had been accused of and since found liable in the Massachusetts' Action for misappropriating other trust assets, in an amount not less than $7 million.

379. Defendants MELLON, TEPLITZKY and the other Fiduciaries failed to exercise proper fiduciary duty on behalf of the STEP PLANS Participants, and failed to fully investigate BENISTAR and CARPENTER.

380. If MELLON, TEPLITZKY, and the other fiduciaries had properly investigated the BENISTAR ENTITIES and CARPENTER, it would have been discovered that the BENISTAR ENTITIES and CAPRENTER were unsuitable fiduciaries.

381. The failure to properly investigate occurred because Defendants MELLON and TEPLITZKY were either receiving compensation from BENISTAR or because they were negligent.

382. TEPLITZKY and other STEP Plan Fiduciaries failed to stop BENISTAR, BENISTAR ADMIN, and STEP SERVICES from perpetrating their scheme to loot STEP.

383. As a result of the aforesaid, hundreds of STEP Plan Participants have been harmed, and value attributable to the STEP Plan has been diverted away from the STEP Plan Participants.

WHEREFORE, PLAINTIFFS pray that this Court enter judgment in their favor and against DEFENDANTS:

(i) for rescission and compensatory damages, together with pre-judgment and post-judgment interest;

(ii) for punitive damages together with pre-judgment and post-judgment interest;

(iii) for costs of suit;

(iv) for attorneys fees; and

(v) for such other and further relief as the Court may deem just and proper.

COUNT IV
BREACH OF DUTY OF DUE CARE, GOOD FAITH, AND FAIR DEALING AGAINST DEFENDANTS INSURANCE COMPANIES, MURPHY, CLU

384. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

385. During the relevant period, STEP PLAN assets included insurance policies procured through the INSURANCE COMPANIES, MURPHY, and CLU.

386. During the Class Period, INSURANCE COMPANIES, MURPHY, and CLU received valuable con-

sideration for the issuance and sale of insurance policies to the STEP PLANS.

387. INSURANCE COMPANIES, MURPHY, and CLU were aware that the STEP PLANS were purported to be welfare benefit Plans.

388. INSURANCE COMPANIES, MURPHY, and CLU owed a duty to S&D, S&D STEP PLAN Participants, the STEP PLAN'S Employer Sponsors, and the STEP PLANS Participants.

389. INSURANCE COMPANIES, MURPHY, and CLU owed a duty to monitor the plan assets.

390. On information and belief, BENISTAR, STEP SERVICES, BURSEY, and CARPENTER became affiliated with the STEP PLANS with the intention of misappropriating Plan assets.

391. In connection with their scheme, on information and belief, BENISTAR, STEP SERVICES, BENISTAR ADMIN, BURSEY, and CARPENTER anticipated that they would be able to divert to their own use a substantial amount of the STEP Plan assets by demanding 20% or 10% of the assets attributable to each employer's participation, or generating insurance commissions on the churning of policies to the BENISTAR 419 Plan, or generating administration and other fees with respect to the BENISTAR 419 Plan.

392. During the Class Period, on information and belief, demutualization proceeds from various insurance carri-

ers, including PRUDENTIAL and METLIFE, were paid on behalf of insurance policies held by the STEP PLANS.

393. On information and belief, MELLON, TEPLITZKY, BENISTAR, and the other Fiduciaries failed to properly credit the STEP PLANS with the demutualization proceeds.

394. INSURANCE COMPANIES, MURPHY, and CLU failed to fully investigate the nature of the payment of the demutualization proceeds to the STEP PLANS.

395. Upon information and belief, INSURANCE COMPANIES, MURPHY, and CLU allowed the demutualization proceeds to be credited to entities other than the STEP PLANS.

396. INSURANCE COMPANIES, MURPHY, and CLU erred in paying the demutualization proceeds and not crediting the STEP Policies.

397. Paying the demutualization proceeds directly instead of crediting the amounts to the insurance policies was an improper and imprudent investment.

398. The failure to properly investigate occurred because INSURANCE COMPANIES, MURPHY, and CLU were negligent.

399. INSURANCE COMPANIES, MURPHY, and CLU failed to stop BENISTAR, BENISTAR ADMIN, STEP SERVICES, BURSEY and CARPENTER from perpetrating their scheme to loot STEP Plan demutalization proceeds.

400. As a result of the aforesaid, hundreds of STEP Plan Participants have been harmed, and value attributable to the STEP PLANS has been diverted away from the STEP PLAN'S Plan Participants.

WHEREFORE, PLAINTIFFS pray that this Court enter judgment in their favor and against DEFENDANTS:

(i) for rescission of insurance premiums and other amounts paid to defendants and compensatory damages, together with pre-judgment and post-judgment interest;

(ii) for punitive damages together with pre-judgment and post-judgment interest;

(iii) for costs of suit;

(iv) for attorneys fees; and

(v) for such other and further relief as the Court may deem just and proper.

COUNT V
VIOLATION OF THE CONSUMER FRAUD AND DECEPTIVE PRACTICES ACT AGAINST INSURANCE COMPANIES, MURPHY, CLU, and LEVY

401. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

402. During the relevant period, STEP Plan assets included insurance policies procured through INSURANCE COMPANIES, MURPHY, CLU, and LEVY.

403. During the class period, INSURANCE COMPANIES, MURPHY, CLU, and LEVY received valuable consideration for the sale of insurance policies to the STEP PLANS.

404. Defendants' INSURANCE COMPANIES, MURPHY, CLU, and LEVY conduct involved trade practices directed to the market generally and/or otherwise implicated consumer protection concerns regarding insurance practices.

405. During the class period, INSURANCE COMPANIES, MURPHY, CLU, and LEVY actively promoted the STEP Plan with the statements that the STEP PLANS were purported to be welfare benefit Plans consistent with IRC and ERISA provisions.

406. During the class period, INSURANCE COMPANIES, MURPHY, CLU, and LEVY made statements through the marketing materials produced and distributed to S&D, S&D STEP PLAN PARTICIPANTS, and upon

information and belief, the other STEP PLANS Employer Sponsors and Plan Participants.

407. During the relevant period, Defendant HARTFORD prepared and manned a booth with HARTFORD agents and company personnel at various broker-dealer and other agent gatherings, including the August 11, through August 19, 1996 convention of the Prime Group (Prime Financial Services) in upstate New York at The Sagamore Hotel at which convention HARTFORD disseminated printed marketing materials to its agents and the public in general, to promote the STEP PLAN concept, including the tax deductibility status of the STEP PLAN and STEP's status as a fully insured and/or guaranteed as required by IRC and ERISA provisions.

408. During the relevant time period, INSURANCE COMPANIES specifically assigned agents and other COMPANY personnel to specifically and solely market and promote STEP.

409. During the relevant time period, NEW YORK LIFE disseminated written materials, with the NEW YORK LIFE logo and stamp of approval, promoting the STEP PLAN concept, including the tax deductibility status of the STEP PLAN and its status as a fully insured and/or guaranteed as required by IRC and ERISA provisions.

410. During the relevant time period, the NEW YORK LIFE materials promoting and marketing STEP were given to the general public and upon information and belief all STEP PLAN employer sponsors listed on the Form 5500s as having their STEP PLANS insured by NEW-YORK LIFE.

411. NEW YORK LIFE exclusively promoted the STEP PLAN concept, in part, because of its institutional and capital commitment to the success of STEP PLAN concept among its agent base.

412. In a November 6, 1996 NEW YORK LIFE corporate memo circulated via facsimile and mail to its agents, NEW YORK LIFE recognized that the STEP PLAN's termination events could be viewed as deferred compensation but disapproved the sale of other welfare plans stating that marketing and allowing the sale of other products "would be undercutting our existing STEP-certified agents and inviting law suits from the STEP-certified agents and the STEP-vendor."

413. In a July 23, 1999 letter from HARTFORD to STEP PLAN participant Dr. Michael Bearb, Marc Burchman specifically misrepresented and described funds held in Dr. Bearb's employer STEP PLAN and segregated the employer amounts as being in a separate "investment portfolio" which is counter to the STEP PLAN concept.

414. In a February 20, 2001 letter from HARTFORD to STEP PLAN participant Dr. Michael Bearb, Marc Burchman further misrepresented that funds held in the STEP PLAN could not be reached by creditors. The letter also referred to Patrick Smith, as the in-house STEP specialist in the HARTFORD home office.

415. HARTFORD knew or should have known that the STEP PLAN funds were not credit proof and could be reached by a QDRO.

416. In various conversations in 1995, MURPHY told S&D that S&D could always get their money from the S&D STEP PLAN.

417. Upon information and belief, these same marketing materials distributed by PRUDENTIAL and NEW YORK LIFE were also freely distributed throughout the class.

418. Upon information and belief, during the relevant time period, NATIONAL LIFE, HARTFORD, and ALLAMERICA produced written marketing materials and employer plan sponsors binders marketing the tax deductibility status of the STEP PLAN, including the Mamorsky Opinion, and the STEP's status as a fully insured and/or guaranteed as required by IRC and ERISA provisions. These materials were freely distributed to each employer plan sponsor of each STEP PLAN as listed on the Form 5500s with each respective insurance company.

419. The INSURANCE COMPANIES, MURPHY, CLU, and LEVY were aware that the disability provisions of each STEP Plan were not fully insured and/or guaranteed as required by IRC and ERISA regulations.

420. The STEP PLANS did not comport with the IRC and ERISA provisions.

421. The INSURANCE COMPANIES, MURPHY, CLU, and LEVY continued to actively market and sell the STEP PLANS even after the commencement of the Coastal case as shown by the new sales in the 1998 and 1999 IRS Form 5500s

422. To each of the employer sponsors listed on the 1998 and 1999 IRS Form 5500s, the INSURANCE COMPANIES misrepresented and/or concealed the tax status of the STEP PLANS by not disclosing and explaining the Coastal case and that STEP had advised the Coastal employer to concede the tax deduction.

423. INSURANCE COMPANIES, MURPHY, CLU, and LEVY were aware or should have known that these statements regarding the tax and ERISA status of the STEP Plan were false and/or deceptive.

424. INSURANCE COMPANIES, MURPHY, CLU, and LEVY made these statements regarding the tax and ERISA status of the STEP Plan with the knowledge and purpose that the STEP PLANS employer sponsors, Plan Participants, and beneficiaries would rely on these statements.

425. The STEP PLANS employer sponsors and Plan Participants relied upon these statements regarding the tax and ERISA status of the STEP PLANS.

426. During the relevant period, STEP Plan assets included life insurance policies procured through PRUDENTIAL and MURPHY.

427. During the relevant period, PRUDENTIAL and MURPHY received valuable consideration for the sale of insurance policies to the STEP Plans.

428. During the relevant period, MURPHY was operating as the agent of PRUDENTIAL.

429. During the relevant period, MURPHY actively promoted the STEP plan with statements that the STEP plan was a welfare benefit plan consistent with IRC and ERISA provisions.

430. Specifically in late 1995 and early 1996, PRUDENTIAL and MURPHY made statements through marketing materials produced and distributed to S&D and S&D STEP Plan participants.

431. Specifically on or about April 12, 1996, MURPHY dropped off a binder at the offices of S&D that included the Mamorsky Opinion, STEP materials with the PRUDENTIAL logo, and other marketing materials regarding the fitness of STEP and its tax deductibility.

432. During the relevant time period, the INSURANCE COMPANIES each produced and distributed to its participating employers, as listed in the FORM 5500s similar employer plan sponsor binders that marketed and promoted STEP, its tax deductibility status, and that the disability provisions of each STEP Plan were fully insured and/or guaranteed as required by IRC and ERISA regulations.

433. During the relevant time period and specifically in late 1995 and early 1996, MURPHY and PRUDENTIAL stated to plaintiff Manuel Sanchez that the disability provisions of each STEP Plan were fully insured and/or guaranteed as required by IRC and ERISA regulations.

434. During the relevant time periods, MURPHY and PRUDENTIAL were aware that the disability provisions

of each STEP Plan were not fully insured and/or guaranteed as required by IRC and ERISA regulations.

435. During the relevant time periods, MURPHY and PRUDENTIAL were aware that the STEP Plans did not comport with the IRS and ERISA provisions.

436. During the relevant time periods, MURPHY made statements to Manuel Sanchez that the contributions to the STEP Plan were currently tax deductible.

437. During the relevant time periods, MURPHY and PRUDENTIAL were aware or should have known that the statements regarding the tax and ERISA status of the STEP Plans were false and/or deceptive.

438. During the relevant time periods, MURPHY and PRUDENTIAL made these statements regarding the tax and ERISA status of the STEP Plan with the knowledge and purpose that the STEP Plans employer sponsors, plan participants and beneficiaries would rely on these statements.

439. MURPHY, in statements to Manuel Sanchez during the relevant period, stated that the STEP Plan was designed in such a way that plan participants could easily withdraw contributions to the Plan and that "severance events" were subject to the direct or indirect control of the Plan participants.

440. During the relevant time periods, MURPHY and PRUDENTIAL were aware or should have known that statements regarding the withdrawal of contributions from the STEP Plan were false and/or deceptive.

441. During the relevant time periods, MURPHY and PRUDENTIAL made these statements regarding the "easy withdrawal" of contributions from the STEP Plan with the knowledge and purpose that the STEP Plans' employers sponsors, plan participants and beneficiaries would rely on these statements.

442. The STEP Plan employer sponsors and plan participants relied upon these statements regarding the "easy withdrawal" of contributions to the STEP Plans.

443. Without these statements and representations, S&D and, upon information and belief, other employer sponsors, would not have participated in STEP Plans.

444. As a result of the aforesaid, hundreds of STEP Plan participants and employer sponsors have been harmed, and value attributable to the STEP Plan has been diverted away from the STEP Plan participants.

445. Without these statements and representations, employer sponsors, such as S&D and upon information and belief other employer sponsors would not have participated in STEP PLANS.

446. As a result of the aforesaid, hundreds of STEP PLANS Participants and employer sponsors have been harmed, and value attributable to the STEP PLANS has been diverted away from the STEP PLANS Plan Participants.

WHEREFORE, PLAINTIFFS pray that this Court enter judgment in their favor and against Defendants:

(i) for treble compensatory damages, together with pre-judgment and post-judgment interest;

(ii) for punitive damages together with pre-judgment and post-judgment interest;

(iii) for costs of suit;

(iv) for attorneys fees; and

(v) for such other and further relief as the Court may deem just and proper.

COUNT VI]
(VIOLATION OF THE FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO") AGAINST ALL DEFENDANTS
[STEP AS ENTERPRISE]

447. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

448. Plaintiffs and the other members of the class are "persons" within the meaning of 18 U.S.C. § 1961 (3).

449. The Defendants are "persons" within the meaning of 18 U.S.C. § 1961 (3).

450. The alleged STEP PLAN is an "enterprise" engaged in, and the activities of which affect, interstate or foreign commerce, within the meaning of 18 U.S.C. § 1961 (4).

451. The STEP PLAN is a separate organization from the defendants.

452. The STEP PLAN, also referred to as simply STEP in certain instances by the defendants and herein, is an alleged multi-employer welfare benefit arrangement.

453. The individual employer STEP PLANS adopted and became associated with the STEP PLAN.

454. As described in the above paragraphs and in further detail below, the STEP PLAN was administered, marketed, and sold as an ERISA multi-welfare benefit plan, with a purported legitimate goal of among other things pro-

viding legitimate welfare benefits to the employees and a valid tax deduction for employers.

455. As described in the above paragraphs and in further detail below, the STEP PLAN was conceived, administered, marketed, and sold by an ongoing structure of the Defendants associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision making.

456. As described in the above paragraphs and in further detail below, each of the defendants played a part in directing the STEP PLAN's affairs by their acts by which the various defendants conceived, administered, marketed, and sold the STEP PLAN scheme to the respective employer STEP PLANS.

457. The Defendants, participated, directly or indirectly, in the conduct of the affairs of the STEP PLAN through a pattern of racketeering activity, as defined by 18 U.S.C. § 1961 (5), and thereby violated 18 U.S.C. § 1962 (c).

458. The pattern of racketeering activity engaged in by the Defendants consisted of numerous violations of 18 U.S.C. § 664, 1341 and 1343, in that said Defendants embezzled, stole, or unlawfully and willfully converted and/or abstracted to their use assets of employee welfare benefit plans, in violation of 18 U.S.C. § 664, and formulated a scheme or artifice to defraud Plaintiffs and the other members of the class and used the U.S. mails and the interstate wires in furtherance of that scheme, in violation of 18 U.S.C. §§ 1341 and 1343.

459. Defendants embezzled, stole, or unlawfully and willfully converted and/or abstracted to their use assets of employee welfare benefit plans, in violation of 18 U.S.C. § 664 in furtherance of the scheme engaged in by the Defendants named in this count which included, but were not limited to:

a) The willful abstraction of resources and assets of the STEP PLAN on behalf of the tax liability of Coastal and its principal was a rebate to the employer in violation of the STEP PLAN documents.

b) The willful abstraction of the resources of the STEP PLAN for the use of the employer's attorneys' fees in Coastal was an illegal diversion of Plan assets for the benefit of a non-participant, was not in the best interest of Plan Participants, was not a proper administrative expense of the STEP Plan and Trust, and therefore violated the STEP Plan documents and section 406 of ERISA.

c) The willful abstraction of the demutualization proceeds from the STEP PLAN assets to TEPLIZTKY, CARPENTER, STEP SERVICES, BURSEY, and/or the BENISTAR ENTITIES.

d) The willful abstraction of the STEP PLAN assets from the STEP PLANS to the BENISTAR 419 PLANS that caused additional commissions and churning of the STEP POLICIES and converted STEP PLAN assets from the STEP PLANS into the BENISTAR 419 PLAN thus causing the STEP PLANS to lose plan assets and potential insolvency.

e) Despite having knowledge of multiple termination events, the INSURANCE COMPANIES, BENISTAR ENTITIES, CARPENTER, MELLON and STEP SERVICES, failed to notify employers of their rights, and those of employees, and failed to properly exercise fiduciary duty, so that BENISTAR, BENISTAR ADMIN, and STEP SERVICES could continue to take insurance commissions, insurance premiums, administration fees and improperly surcharge Plan assets for their own ultimate good thus converting individual employer STEP PLAN assets for their own use.

f) The abstraction of STEP PLAN assets in years 1998 and 1999 to pay fiduciary audit fees by Mamorsky as shown on the IRS Forms 5500 when such audits were not performed or if performed were not properly performed as to discover the multiple fiduciary breaches that occurred as described above.

g) The illegal assessments in the context of "terminations" and "withdrawals" taken by the BENISTAR ENTITIES, CARPENTER, BURSEY, and STEP SERVICES were willful abstractions of plan assets.

460. The mail and wire communications used in furtherance of the scheme engaged in by the Defendants' named in this count included, but were not limited to:

a. mailings from Defendants to Plaintiffs including;

1) On or about June 20, 2002, BURSEY and BENISTAR did cause by mail to be sent let-

ters to all participating employers with STEP PLANS stating that BENISTAR and STEP SERVICES would impose a termination assessment of 20% and pay only 80% of the calculated benefit if employers did not take its offer to "rollover" to the new BENISTAR 419 Plan. If employers chose to rollover to the BENISTAR 419 Plan, an assessment of 10% would be charged. No reason for the difference in percentages was given. These mailings furthered the scheme by allowing the defendants to abstract further unexplained assessment, charge further administrative fees, directly or indirectly benefit through further insurance commissions and for further reasons as detailed in the above paragraphs.

2) As intimidation and a punishment for S&D demanding transfer of its Plan assets to another Plan, instead of the BENISTAR 419 Plan, on or about September 25, 2002 STEP SERVICES initiated litigation against S&D and its attorney John Koresko stating that by S&D's sending a cease and desist letter to BENISTAR and questioning its practices in said letter, S&D and its attorney had defamed BENISTAR and by its questions constructively withdrawn from the STEP PLAN so that all S&D STEP PLAN plan assets were forfeited to BENISTAR. STEP PLAN Services, Inc. v. Koresko & Associates, John J. Koresko, V and Sanchez & Daniels, No. 02-CV-1711, District of Connecticut ("Connecticut action"). The original complaint and the pleadings in this matter were mailed. These mailings further the scheme by threatening and scaring any potential questions, dissenters or complainers about the administration or viability of the STEP PLANS so the defendants could continue to operate the STEP PLAN scheme and continue to

collect further insurance premiums, administrative fees, insurance commissions, and other abstractions as detailed above.

3) In a September 30, 2003 letter to SANCHEZ, the BENISTAR ENTITIES attorney Jack E. Robinson misrepresented "last week Judge Davis in Pennsylvania dismissed the Arrow Drilling case and awarded Benistar attorneys' fees and costs." Jack E. Robinson then further threatened SANZCHEZ by stating: "And like Arrow Drilling, S&D will end up paying dearly for being in league with them." These communications further the scheme by threatening and scaring any potential questions, dissenters or complainers about the administration or viability of the STEP PLANS so the defendants could continue to operate the STEP PLAN scheme and continue to collect further insurance premiums, administrative fees, insurance commissions, and other abstractions as detailed above.

b. mailings from Defendants to other employers and participants in the STEP Plan including:

1) On or about June 20, 2002, BURSEY and BENISTAR did cause by mail to be sent letters to all participating employers with STEP PLANS stating that BENISTAR and STEP SERVICES would impose a termination assessment of 20% and pay only 80% of the calculated benefit if employers did not take its offer to "rollover" to the new BENISTAR 419 Plan. If employers chose to rollover to the BENISTAR 419 Plan, an assessment of 10% would be charged. No reason for the difference in percentages was

given. These mailings furthered the scheme by allowing the defendants to abstract further unexplained assessment, charge further administrative fees, directly or indirectly benefit through further insurance commissions and for further reasons as detailed in the above paragraphs.

2) In late 1997, TEPLITZKY and MELLON caused the new STEP PLAN Document to be mailed to all participating employers for each STEP PLAN; but TEPLITZKY and MELLON did not highlight or describe the changes to the STEP PLAN Documents. These mailings furthered the scheme by allowing the STEP PLAN to further continue although it was in a state of termination, which allowed the defendants to collect further insurance premiums, administrative fees, insurance commissions, and other abstractions as detailed above.

3) Via mail, BENISTAR and its affiliates, including CARPENTER and BURSEY, threatened to dissipate the assets attributable to the S&D employees, and to discriminate against S&D employees as of December 2, 2002. (Ex. "H"). These mailings further the scheme by extorting and scaring any potential questions, dissenters or complainers about the administration or viability of the STEP PLANS so the defendants could continue to operate the STEP PLAN scheme and continue to collect further insurance premiums, administrative fees, insurance commissions, and other abstractions as detailed above.

4) In a July 23, 1999 letter from HARTFORD to STEP PLAN participant Dr. Michael Bearb, Marc Burchman specifically misrepresented and described funds held in

Dr. Bearb's employer STEP PLAN and segregated the employer amounts as being in a separate "investment portfolio" which is counter to the STEP PLAN concept.

5) In a February 20, 2001 letter from HARTFORD to STEP PLAN participant Dr. Michael Bearb, Marc Burchman further misrepresented that funds held in the STEP PLAN could not be reached by creditors. The letter also referred to Patrick Smith, as the in-house STEP specialist in the HARTFORD home office.

c. mailings between Defendants and tax advisors and accountants for participants in the STEP PLAN;

d. mailings from Defendants to the various professionals, such as accountants and law firms, or other representatives of Plaintiffs and the class;

e. mailings and interstate telephone communications among Defendants;

1) In a November 6, 1996 NEW YORK LIFE corporate memo circulated via facsimile and mail to its agents, NEW YORK LIFE recognized that the STEP PLAN's termination events could be viewed as deferred compensation but disapproved the sale of other welfare plans stating that marketing and allowing the sale of other products "would be undercutting our existing STEP-certified agents and inviting law suits from the STEP-certified agents and the STEP-vendor."

f. interstate and intrastate telephone communications between Defendants and Plaintiffs and the class;

l) On or about September 29, 2003 in a September 29, 2003 dated press release drafted by the BENISTAR ENTITIES and sent via email through interstate and intrastate telephone connections to all participating employers, BENISTAR misrepresented that "last week Judge Davis in Pennsylvania dismissed the Arrow Drilling case" and "awarded Benistar attorneys' fees and costs." BENISTAR further stated that the Arrow Drilling case was a carbon copy of another baseless action, this present action, that Judge Davis had dismissed as well. The press release did not state that this action was still pending or refer to the Massachusetts's Action. These communications further the scheme by threatening and scaring any potential questioners, dissenters or complainers about the administration or viability of the STEP PLANS so the defendants could continue to operate the STEP PLAN scheme and continue to collect further insurance premiums, administrative fees, insurance commissions, and other abstractions as detailed above.

g. interstate telephone communications between Defendants and various professionals, such as accountants and law firms, or other representatives of Plaintiffs and the class;

461. The pattern of racketeering activity engaged in by these Defendants began in or about 1992 and has continued to date and is part of Defendants' way of doing business.

462. Plaintiffs and the other members of the class have suffered injury to their business or property within the

meaning of 18 U.S.C. § 1964 (c) as a consequence of the violation by the Defendants of 18 U.S.C. § 1962 (c).

WHEREFORE, PLAINTIFFS pray that this Court enter judgment in their favor and against Defendants. Pursuant to 18 U.S.C. § 1964 (c), Plaintiffs and the other members of the class are entitled to recover treble damages, attorneys' fees and related expenses and appropriate equitable relief.

COUNT VII

(VIOLATION OF FEDERAL RICO) AGAINST ALL DEFENDANTS [ASSOCIATION-IN-FACT ENTERPRISE]

463. Plaintiffs reallege and incorporate the allegations of the above paragraphs as though they were fully set forth herein.

464. Plaintiffs and the other members of the class are "persons" within the meaning of 18 U.S.C. § 1961 (3).

465. The Defendants are "persons"' within the meaning of 18 U.S.C. § 1961 (3).

466. The association in fact of the Defendants named in this court is an "enterprise" engaged in, and the activities of which affect, interstate or foreign commerce, within the meaning of 18 U.S.C. § 1961 (4).

467. The Defendants participated, directly or indirectly, in the conduct of the affairs of an association in fact through a pattern of racketeering activity, as defined by 18 U.S.C. § 1961 (5), and thereby violated 18 U.S.C. § 1962 (c).

468. The pattern of racketeering activity engaged in by the Defendants named in this count consisted of numerous violations of 18 U.S.C. §§ 664, 1341 and 1343, in that said Defendants embezzled, stole, or unlawfully and willfully converted and/or abstracted to their use assets of employee welfare benefit plans, in violation of 18 U.S.C. § 664, and formulated a scheme or artifice to defraud Plaintiffs

and the other members of the class and used the U.S. mails and the interstate wires in furtherance of that scheme, in violation of 18 U.S.C. §§ 1341 and 1343.

469. The pattern of racketeering activity engaged in by these Defendants began in or about 1992 and has continued to date and is part of Defendants' way of doing business.

470. Plaintiffs and the other members of the class have suffered injury to their business or property within the meaning of 18 U.S.C. § 1964 (c) as a consequence of the violation by the Defendants of 18 U.S.C. § 1962 (c).

WHEREFORE, PLAINTIFFS pray that this Court enter judgment in their favor and against Defendants. Pursuant to 18 U.S.C. § 1964 (c), Plaintiffs and the other members of the class are entitled to recover treble damages, attorneys' fees and related expenses and appropriate equitable relief.

COUNT IIX

CONSPIRACY TO VIOLATE FEDERAL RICO AGAINST ALL DEFENDANTS

471. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

472. Each Defendant agreed to and assisted each other in the marketing and promotion of the STEP PLAN and the insurance policies provided as part of the scheme.

473. Each Defendant agreed to maintain an interest in or control of the STEP PLAN or to participate in the affairs of such STEP PLAN through a pattern of racketeering activity

474. Each Defendant further agreed that someone would commit at least two predicate acts to accomplish those goals as alleged above.

475. Each Defendant knowingly agreed to perform services of a kind which facilitate the activities of those who are operating the STEP PLAN in an illegal manner.

476. These Defendants knew that the STEP PLAN was being marketed in a false and deceptive manner, and that the benefits of insurance policies were being misrepresented, and nevertheless took affirmative steps to assist the other Defendants by, among other things, providing misleading representations, including but not limited to policy representations and tax deductibility representations.

477. Through the wrongful conduct alleged above, the Defendants conspired with the other Defendants to violate 18 U.S.C. § 1962 (c) as set forth above and have thereby violated 18 U.S.C. § 1962 (d).

478. The INSURANCE COMPANIES, LEVY, MURPHY and CLU agreed to and did assist the other Defendants and others in the marketing of the STEP Plan. The INSURANCE COMPANIES, LEVY, MURPHY and CLU knew that the scheme was being marketed in a false and deceptive manner, and nevertheless took affirmative steps by assisting these Defendants in marketing the STEP Plan. Said

affirmative steps included the dissemination of false information concerning the STEP Plans, such as false written statements to the effect that the STEP programs fully complied with ERISA and IRC regulations. Said affirmative steps included the circulation of false information to the Plaintiffs and certain members of the class to the effect that the position being taken by the IRS with respect to the STEP PLANS were unfounded.

479. Through the wrongful conduct alleged above, these Defendants conspired with the other Defendants to violate 18 U.S.C. § 1962 (c) as set forth in those counts and have thereby violated 18 U.S.C. § 1962 (d).

480. Plaintiffs and the other members of the class have suffered injury to their businesses or property within the meaning of the 18 U.S.C. § 1964 (c) as a consequence of the violation by all Defendants of 18 U.S.C. § 1962 (d).

WHEREFORE, PLAINTIFFS pray that this Court enter judgment in their favor and against Defendants. Pursuant to 18 U.S.C. § 1964 (c), Plaintiffs and the other members of the class are entitled to recover treble damages, attorneys' fees and related expenses and appropriate equitable relief.

COUNT IX

APPLICATION FOR PRELIMINARY INJUNCTION AGAINST BURSEY, CARPENTER, STEP SERVICES, BENISTAR, BENISTAR ADMIN

481. Plaintiffs reallege and incorporate the above paragraphs as though they were fully set forth herein.

482. As explained above, the fiduciary duty of loyalty entails a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a Plan with an "eye single" to the interests of the Participants and beneficiaries, regardless of the interests of the Fiduciaries themselves or the Plan sponsor.

483. Defendants BURSEY, CARPENTER, STEP SERVICES, BENISTAR, and BENISTAR ADMIN have breached their duty to avoid conflicts of interest not only in the ways described above, but also, by threatening to constructively withdraw/terminate employers who question the Defendants' BURSEY, CARPENTER, STEP SERVICES, BENISTAR, and BENISTAR ADMIN actions or attempt to transfer to another welfare benefit Plan.

484. As a result of aforementioned breaches of the STEP PLANS and the misappropriation of other trust assets, upon information and belief Defendants BURSEY, CARPENTER, STEP SERVICES, and BENISTAR have forfeited their respective insurance policies for any present and/or future fiduciary breaches against Plaintiffs.

485. As a result of the aforementioned breaches, Plaintiffs are suffering immediate irreparable harm because BURSEY, CARPENTER, STEP SERVICES, and BENISTAR are threatening to terminate the Plan and loot the Plan assets for its use.

486. Plaintiffs do not have an adequate remedy at law.

487. Plaintiffs have a clear right to relief in that Defendants have breached their fiduciary duties by engaging at self-dealing behavior at the expense of the Participants.

488. The grant of a preliminary injunction will merely preserve the status quo.

489. Greater injury will be done by refusing the preliminary injunction than by granting it.

490. As a direct and proximate result of Defendants' breaches and other wrongful conduct, S & D and other similarly situated employers will suffer immediate irreparable harm by the termination of their Plans and the loss of benefits to the Participants.

WHEREFORE, Plaintiffs demand judgment as follows:

(a) DEFENDANTS shall immediately separate from the STEP Plan and Trust all the insurance policies and/or proceeds from such policies if the policies are no longer in effect on the lives of the partners and employees of Sanchez & Daniels, and shall immediately deliver those policies, with all cash values and rights attendant thereto, and all other assets attributable to the participation of Sanchez & Daniels in the Sanchez & Daniel STEP Plan, to Manuel Sanchez or such other person or entity he shall designate, as Trustee, to hold such assets in trust for the benefit of said partners and employees until further order of this Court.

(b) DEFENDANTS are enjoined from subtracting any amount, including without limitation, fees, costs, or other expenses or reductions, from the policies so transferred or to any policies associated with the Plaintiffs; and DEFENDANTS shall restore, prior to any such transfer, any subtractions to all Plaintiffs' policies that occurred in 2002.

(c) DEFENDANTS are enjoined from taking any action detrimental to Sanchez & Daniels, its employees or partners, or any Plaintiff until further order of this Court; however, DEFENDANTS may appear and defend this action provided, DEFENDANTS use no assets of any STEP Plan and Trust to appear, defend, or participate in this case and any case relating to the claims made by Sanchez & Daniels or other Plaintiffs.

(d) DEFENDANTS shall immediately restore any assets transferred from the STEP PLANS to the BENISTAR 419 PLAN or paid to the PROMOTERS of the BENISTAR 419 PLAN .

(e) Unless the BENISTAR ENTITIES prove their fitness or continue as plan fiduciaries, the assets of the STEP PLANS, as restored, shall be transferred to the possession and control of a replacement fiduciary to be appointed by this Court.

(e) A full accounting.

(f) Further necessary or proper relief, including monetary damages, injunctive relief, attorney\fees,

interest, costs of suit, punitive damages, and any other relief the Court deems appropriate.

Respectfully submitted,

By: _____

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Dated: November 7, 2003

APPENDIX N – MEMORANDUM AND ORDER RE: PRELIMINARY INJUNCTION, DATED JUNE 14, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, et al.,
Plaintiffs

vs. Case No. 03 C 1550

WAYNE BURSEY, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

This case concerns the marketing and administration of a "severance trust executive program" (STEP) plan, a type of employee welfare benefit plan targeted to employers with highly compensated employees. The partners and employees of Sanchez & Daniels, a Chicago law firm, on behalf of a putative class of STEP Plan investors, have sued a number of persons and entities who they allege fraudulently marketed the Plan and thereafter mismanaged it. They allege violations of the Employee Retirement Income Security Act (ERISA) and the Illinois Consumer Fraud Act, as well as common law fraud and breach of fiduciary duty. Plaintiffs have moved for a preliminary injunction seeking the removal of defendant STEP Plan Services, Inc. as administrator of the Plan and

appointment of a receiver to manage the Plan's assets. For the reasons set forth below, the Court denies plaintiffs' motion.

Plaintiffs were participants in a STEP plan created by Teplitzky & Company at some point in the 1990's. At some later point, Benistar Admin Services, Inc. became administrator of the Plan. In February 2002, STEP Plan Services, Inc. took over as Plan administrator. Wayne Bursey is the president of STEP Plan Services, Inc. Plaintiffs contend that STEP Plan Services, Inc. is the *alter ego* of several entities with the name "Benistar," which plaintiffs say are controlled by defendant Daniel Carpenter.

In their motion for preliminary injunction, the plaintiffs seek an order removing STEP Services, Inc. as administrator of the STEP Plan and preventing certain other defendants from playing any role in administering the Plan. Pltf. Motion, p. 1. Plaintiffs base this on allegations regarding various defalcations they say that Carpenter, various entities affiliated with him, and other defendants have committed, some of which purportedly concern the STEP Plan and some of which are unrelated to the STEP Plan. Plaintiffs also contend that the Plan administrator is effectively insolvent, which, plaintiffs appear to contend, renders it unfit to administer the Plan and may make it unable to satisfy a judgment if plaintiffs ultimately obtain one.

The purpose of a preliminary injunction is not to give the plaintiffs the ultimate relief they seek in the case. *See, e.g., Warnervision Entertainment v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996). Rather, its purpose is to pre-

vent irreparable injury and thereby preserve the relative positions of a party so that the court can render a meaningful decision once a trial on the merits is held. *United Food & Commercial Workers Union, Local 1009* v. *Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998); *see Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

In order to obtain a preliminary injunction, the plaintiff must show some likelihood of success on the merits and that if an injunction is not granted, it will suffer irreparable injury for which it lacks an adequate legal remedy. *See, e.g., Foodcomm Int'l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003). If the plaintiff fails to meet anyone of these prerequisites, the motion for a preliminary injunction must be denied. *See, e.g., Cox v. City of Chicago*, 868 F.2d 217, 223 (7th Cir. 1989). If, on the other hand, the plaintiff establishes the prerequisites identified above, the Court then balances the harm risked by the moving party against that which the nonmoving party will suffer if the injunction is granted. *Foodcomm*, 328 F.3d at 303.

The Court need not assess the plaintiffs' claim of a likelihood of success on the merits, for they have failed to make a showing of irreparable harm, one of the "essential prerequisite[s]" for entry of a preliminary injunction. *See Jones* v. *Infocure Corp.*, 310 F.2d 529, 535 (7th Cir. 1001). Plaintiffs' primary focus appears to be defendant Carpenter, the sole shareholder of defendant Benistar Ltd., of which former Plan administrator and current defendant Benistar Admin Services, Inc., is a wholly owned subsidiary, and to which current Plan administrator STEP Plan Services, Inc. is said to be affiliated in a manner that plaintiffs do not describe with

specificity. In a civil case tried in Massachusetts state court, Carpenter was recently found liable to investors in another Benistar-related entity, Benistar Property Exchange Trust Co., for over $25 million, based on claims of breach of fiduciary duty, misappropriation and/or conversion, and fraud. Benistar Admin Services, Inc. was later found by the trial judge to be liable for this judgment on an *alter ego* theory. Carpenter was thereafter indicted by a federal grand jury on fraud-related charges arising from the same events and is currently awaiting trial. Based on these events among others, plaintiffs appear to argue that neither Carpenter nor any entity with which he is connected should have anything to do with managing the STEP Plan.

A showing of current control or at least current involvement by Carpenter in the management or operation of the Plan administrator would seem to be an essential predicate of their request given its focus on Carpenter's alleged wrongdoing. But plaintiffs provided no such evidence with their motion. Defendant Wayne Bursey, the president and CEO of STEP Plan Services, Inc., states in an affidavit submitted in response to plaintiffs' motion that Carpenter resigned as STEP Plan Services' board chairman in January 2004, that he makes no business or financial decisions for the company, and that he has no control over the STEP plan's funds. This evidence is uncontradicted on the present record. In addition, plaintiffs have provided nothing to the Court that indicates that Carpenter's adjudicated defalcations or any of the others plaintiffs cite involved the STEP plan's assets, or that those assets are at risk from the Massachusetts civil verdict or the

possibility of a restitution or forfeiture judgment in the criminal case involving Carpenter.

Plaintiffs also suggest that Benistar, Benistar Admin Services, and - they seem to suggest- other related entities like STEP Plan Services, Inc. are or will be rendered insolvent by the Massachusetts civil verdict. But there is no indication that STEP Plan Services, Inc. was a defendant in that case or that it has been or is likely to become responsible for the verdict on an *alter ego* basis. And in any event, it appears based on defendants' submission that in Massachusetts, a prevailing party cannot execute on a judgment until appeals have been completed. At this point the Massachusetts verdict has not even been reduced to a final judgment in the trial court let alone affirmed on appeal. For this reason, it does not appear at all likely that the Massachusetts judgment will become subject to execution before final judgment is entered in the present case. [1] And plaintiffs have provided the Court with no evidence indicating that the existence of the Massachusetts verdict, which Carpenter and the *alter ego* entities claim they are vigorously contesting, impairs STEP Plan Services, Inc.'s current ability to perform its functions with regard to the Plan.

The remaining matters cited by plaintiffs, assuming they are proven, are suggestive of wrongdoing that might ulti-

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[1] Discovery in the present case is set to close on November 22, 2004, and the deadline for filing dispositive motions is December 22, 2004. The Court intends to adhere to these dates and plans to set the case for trial in early spring 2005

mately result in a judgment on the merits in their favor. However, plaintiffs have not made a persuasive case that these matters, either individually or collectively, place either the plaintiffs or the Plan at risk of irreparable harm in the interim for which they lack an adequate remedy at law such that removal of the current Plan administrator might be appropriate.

For these reasons, the Court finds that plaintiffs have failed to raise a genuine issue regarding the existence of irreparable harm and thus that no evidentiary hearing is needed. *See In re Aimster Copyright Litigation*, 334 F.3d 643,653-54 (7th Cir. 2003) ("in any case in which a party seeks an evidentiary hearing [on a motion far preliminary injunction], he must be able to persuade the court that the issue is indeed genuine and material and so a hearing would be productive"). Plaintiffs have failed to show that they will suffer "harm that cannot be prevented or fully rectified by the final judgment after trial." *Anderson* v. *U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 478 (7th Cir. 2001). Because they cannot establish this essential prerequisite to their motion for a preliminary injunction, the Court denies the motion.

Conclusion

For the reasons stated above, the Court denies plaintiffs' motion for a preliminary injunction [docket # 187-1].

Date: June 14, 2004

MATTHEW F. KENNELLY
United States District Judge

APPENDIX O– MEMORANDUM AND ORDER RE: WITHDRAWAL OF CLASS ALLEGATIONS, DATED OCTOBER 19, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOHN DANIELS, et al.,
Plaintiffs

vs. Case No. 03 C 1550

WAYNE BURSEY, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

The plaintiffs in this case, attorneys at a Chicago law firm and the law firm itself, sued the defendants for claims arising from the marketing to the plaintiffs of a STEP plan, a particular type of employee benefit plan, and the later administration of the plan. They also sought to represent a class of persons and/or entities that had adopted similar plans, whether marketed or administered by those involved with the plaintiffs' plan or by other entities.

Earlier this year, the plaintiffs filed a motion for class certification, and the defendants responded. The plaintiffs, who are represented by Chicago counsel and John Koresko, and

attorney from Bridgeport, Pennsylvania, engaged in settlement negotiations with the defendants, and as a result the sought to delay the filing of their reply brief on the motion for class certification. The Court granted this request.

Magistrate Judge Sidney Schenkier then conducted a series of settlement conferences that resulted in an agreement to settle the named plaintiffs' individual claims and withdraw their class claims. This was followed by a motion to amend the complaint to withdraw the class allegations. Attorney Koresko has objected to the motion. For the reasons stated below, the motion to amend is granted.

Discussion

Mr. Koresko purports to speak on behalf of the absent members of the putative class who, he claims, will be left high and dry by the settlement and amendment of the complaint. The Court assumes for purposes of discussion that Mr. Koresko has standing to object to the motion for leave to amend.[1]

Mr. Koresko's objection is premised on his contention that when a case is filed as a putative class action, it may not be settled on an individual basis without court approval under

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[1] It is unlikely that Mr. Koresko or the absent members of the uncertified class have such standing. *See* Fed. R. Cov. P. 23 (e)(4)(A) ("Any class members may object to a proposed settlement, voluntary dismissal, or compromise *that requires court approval under Rule 23 (e)(1)(A)*"); *id* 23(e)(1)(A) (requiring court approval only of a settlement of the claims, issues, or defenses of a certified class).

Federal Rule of Civil Procedure 23(e), even if a class has not yet been certified. This contention is without merit. Rule 23(e)(1)(A), as amended in 2003, makes it clear that the Rule's requirement of court approval applies only to settlements "of the claims, issues, or defenses *of a certified class*." Fed. R. Civ. P. 23(e)(1)(A) (emphasis added). *See, e.g.*, 5 J Moore, Moore's Federal Practice¶ 23.160 at p. 23-486 (2004). Even though this provision of the amended Rule did not take effect until after the present case was filed, a new procedural rule applies to cases that were pending at the time the rule takes effect. *See Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc.*, 202 F.3d 957, 958 (7th Cir. 2000).

The settlement in this case that was negotiated under Magistrate Judge Schenkier's supervision disposes only of the individual claims of the name plaintiffs. The class claims are not being dismissed, rather they are being withdrawn by amendment. Thus the "two dismissal rule" of Federal Rule of Civil Procedure 41 (a)(1), cited by Mr. Koresko, does not apply and cannot operate to affect the claims of the absent class members.

Each of the defendants concedes that the settlement of the named plaintiffs' individual claims and their withdrawal of their class allegations will have no preclusive effect on the claims of any absent class members will be perfectly free to file his or her own lawsuit, unimpaired in any way by the settlement of the individual claims of the named plaintiffs or the withdrawal of their class claims. Moreover, because the statue of limitations is tolled for absent class members while a case is pending, *see Elmore v. Henderson*, 227 F.3d 1009,

1012 (7th Cir. 2000), the claims of the absent class members will not be impaired in any way by the settlement or by the passage of time between the filing of the case and its disposition.

Mr. Koresko appears to argue that even if Rule 23 (e) does not require court approval, the Court should nonetheless intervene. The short answer to this is that apart from approving amendment of the complaint, the law does not entitle the Court to prevent the settlement of the individual claims the parties have negotiated. The Court is required to approve the proposed amendment of the complaint, but on the score the Rules provide that leave "shall be freely given when justice so requires," Fed.R.Civ.P. 15(a), and the Court, applying that standard, finds that the amendment requested by the plaintiffs should be permitted. The cases cited by Mr. Koresko in which amendment was refused involved situations where another party in the case would be unfairly prejudiced in some way. Such is not the case here. Though the Court might balk at approving the proposed withdrawal of the class allegations if we believed the putative members of uncertified class would be prejudiced, Mr. Koresko's contentions that they will be harmed are unconvincing.

Finally, this case is nothing like *Weiss v. Regal Connections*, ____F.3d.___, 2004 WL 2175011 (3d Cir. Sept., 2004), in which the Third Circuit recently barred a defendant from using the device of a Rule 68 offer of judgment to strong-arm the elimination of a putative class' claims. The settlement in the present case, by contrast, was negotiated among all the named parties under the supervision of a magistrate judge. There is no basis to "exercise" non-existent

authority to disapprove it under the guise of denying leave to amend.

The Court has considered all of Mr. Koresko's remaining arguments and has found them lacking in merit.

Conclusion

For the reasons stated above, the plaintiffs' motion for leave to amend their second amended complaint to withdraw their class allegations is granted [docket #339-1]. Defendants' motion for joinder in the plaintiffs' motion is granted [docket #335-1]. Plaintiffs are granted leave to file *instanter* their proposed third amended complaint. Plaintiffs' motion for class certification [docket #207-1] is terminated as moot. The case remains set for a status hearing on October 21, 2004 at 9:30 a.m.

MATTHEW F. KENNELLY
United States District Judge

Date: October 19, 2004

APPENDIX P- ORDER OF JUDGMENT, DATED OCTOBER 29, 2004

United States District Court
Northern District of Illinois
Eastern Division

Daniels

v.

Bursey

JUDGMENT IN A CIVIL CASE

Case Number: 03 C 1550

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered dismissing with prejudice, the third amended complaint and all crossclaims and counterclaims.

Michael W. Dobbins, Clerk of Court

Date: 10/26/2004 Olga Rouse, Deputy Clerk